No. 2956

United States

Circuit Court of Appeals

For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Amended Complaint.

Now comes the above-named plaintiff, by leave of Court first had and obtained, and files this its first amended complaint in the above-entitled action and complains of the defendant above-named, and for cause of action alleges:

I.

That plaintiff now is, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire.

III.

That at the time of the commencement of this action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America.

IV.

That heretofore, to wit, on the 5th day of June, 1908, the defendant became and was indebted to one

Edward O. Allen [1*] in the sum of sixty-eight thousand four hundred sixty and 59/100 ($68,460.59) dollars, for money had and received by defendant to and for the use of said Edward O. Allen within twenty (20) months prior to the said 5th day of June, 1908.

V.

That the defendant promised to pay said sum, but though demand has been made upon him, he has not paid the said sum, or any part thereof, or any of the interest due thereon, and the whole of said sum, together with interest thereon, is now due, owing, and unpaid.

VI.

That on the 24th day of April, 1913, the said Edward O. Allen assigned and transferred the said claim unto this plaintiff, and plaintiff ever since has continued to be and now is the lawful owner and holder thereof.

And for a second cause of action against said defendant, plaintiff alleges:

I.

That plaintiff now is, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire.

III.

That at the time of the commencement of this

*Page-number appearing at foot of page of original certified Transcript of Record.

action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America. [2]

IV.

That on the 28th day of May, 1908, the defendant became indebted to one J. Dalzell Brown in the sum of forty thousand ($40,000) dollars, for money paid by the said J. Dalzell Brown for the use of defendant and at defendant's request within twenty (20) months prior to said 5th day of June, 1908.

V.

That thereafter on the said 28th day of May, 1908, and prior to the commencement of this action, the said claim of said J. Dalzell Brown against said defendant was transferred and assigned by the said J. Dalzell Brown to one Edward O. Allen; that thereafter, to wit, on the 24th day of April, 1913, the said Edward O. Allen assigned and transferred the said claim unto this plaintiff, and plaintiff ever since has continued to be and now is the lawful owner and holder thereof.

VI.

That the defendant promised to pay said sum, but though demand has been made upon him, he has not paid the said sum, or any part thereof, or any interest due thereon, and the whole of said sum, together with interest thereon, is now due, owing, and unpaid.

And for a third cause of action against said defendant, plaintiff alleges:

I.

That plaintiff is now, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire. [3]

III.

That at the time of the commencement of this action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America.

IV.

That on or about the 20th day of September, 1906, at Lakeport, County of Lake, State of California, the defendant and one L. J. Shuman entered into a written agreement for the purchase of certain land in the county of Lake, State of California, a copy of which agreement is attached hereto, made a part hereof, and marked Exhibit "A."

V.

That thereafter and on or about the said 20th day of September, 1906, the said L. J. Shuman transferred, assigned, and set over the said contract, together with all rights arising thereunder and under said transaction unto one J. Dalzell Brown.

VI.

That pursuant to the terms of said agreement, the said J. Dalzell Brown paid to said defendant on account of said purchase price, the first, second, and

third installments in the amounts and at the times specified in said contract, and also paid to said defendant the interest mentioned in said agreement, in the amounts and at the times therein specified; that said J. Dalzell Brown, at the date of the execution of said agreement, also paid to defendant the sum of thirty-five hundred ($3500) dollars, making a total paid to said defendant on account of said purchase price, including interest, of twenty-eight thousand four hundred and sixty and 59/100 ($28,460.59) dollars. [4]

VII.

That pursuant to the terms of said agreement said Brown, on or about the 15th day of December, 1906, entered into possession of the premises mentioned in said agreement; that between said 15th day of December, 1906, and the 18th day of December, 1907, said Brown, with the knowledge and consent of said defendant, made and constructed valuable improvements upon said premises, and prior to the 18th day of December, 1907, had expended in making said improvements the sum of forty thousand ($40,000) dollars; that said improvements are now of the value of forty thousand ($40,000) dollars to said defendant.

VIII.

That on or about the 15th day of December, 1906, pursuant to the terms of the said agreement, the defendant furnished to the said Brown abstracts of title covering the lands agreed to be sold in and by the said written agreement Exhibit "A"; that pursuant to the terms of the said agreement, the said

Brown, within 30 days after receipt of the said abstract, reported in writing to the defendant objections to the title to said property; that the defects in the title specified by the said Brown in the said written objections rendered the title of the defendant to the property described in said written agreement unmerchantable; that the defendant agreed with said Brown that the said defects rendered the title unmerchantable and undertook and agreed with said Brown to remove the same.

IX.

That the defendant did not remove the said defects within a period of ninety days after the receipt by defendant of said written report; that at the expiration of said period of ninety days the said Brown, at the instance and request of the defendant, agreed to and did extend the time of defendant [5] for the removal of said defects, and both of the parties to the said agreement agreed that said defendant should have a reasonable further time in which to remove said defects.

X.

That thereafter on or about the 12th day of September, 1907, the said Brown at the instance and request of defendant, waived in writing a tender by defendant of a deed of the said premises on the 15th day of September, 1907, as called for by said agreement Exhibit "A," and said defendant, in consideration of said waiver, covenanted and agreed that he, said defendant, would proceed with diligence to remove and would cause to be removed or cured the defects in said title so specified in said written objec-

tions, and that at the earliest possible day thereafter he would cause to be delivered to said Brown a good and sufficient deed conveying said property to said Brown free from the aforesaid defects; and said Brown and defendant then and there agreed that the balance of said purchase price called for by Exhibit "A" should be paid by said Brown to defendant, concurrently with the delivery by defendant to said Brown of such deed.

XI.

That the defendant did not proceed with any diligence to remove or cure, and never has removed or cured, the said defects, but has at all times failed and neglected to cause the same to be removed or cured, and the same never have been removed or cured; that defendant has not at any time delivered or offered to deliver to the said Brown, or to his assignee Edward O. Allen hereinafter referred to, a good and sufficient deed of grant, bargain, and sale covering, or conveying to said Brown or to his assignee Edward O. Allen, the title to the above-described parcels of land.

XII.

That on or about the 18th day of December, 1907, without [6] giving to said Brown any notice, reasonable or otherwise, of his intention to make time again of the essence of said agreement, and without making to said Brown a tender of a good and sufficient deed of grant, bargain, and sale of said premises, and without removing the said defects rendering the said title unmerchantable, the said defendant notified said Brown that he would not be bound

by said contract Exhibit "A," or by any of the provisions or by the aforesaid modifications thereof, and demanded the possession of the said property from the said Brown and brought an action of ejectment against the said Brown to recover the possession thereof, and thenceforth repudiated the aforesaid contract and agreements, and abandoned the same and treated the same as rescinded.

XIII.

That thereafter and pending said action of ejectment, the said Brown transferred and assigned to one Edward O. Allen the said contract, a copy of which is hereto annexed, marked Exhibit "A" as aforesaid, together with all claims, rights, and interests of every kind and character which had accrued or could or might thereafter accrue by reason of the aforesaid agreements, acts, and transactions.

XIV.

That thereafter and pending the said action of ejectment, the said Allen elected to treat and did thereafter treat the said acts and conduct of defendant, beginning with the 18th day of December, 1907, as an offer to rescind said contract and agreements, and as a rescission thereof, and thenceforth treated said contract and agreements as rescinded and caused to be surrendered up to said defendant the possession of the premises described in the said agreement; that defendant received and accepted and resumed the possession of said premises from plaintiff on or about the 3d day of June, 1908. [7]

XV.

That thereafter on the 24th day of April, 1913, and prior to the commencement of this action said Ed-

ward O. Allen transferred and assigned to this plaintiff all of his rights, claims and interests of every kind and character which had accrued or might thereafter accrue by reason of the aforesaid transactions, and particularly his right to recover from defendant the moneys paid to defendant by said Brown pursuant to said contract Exhibit "A" and the moneys paid out by said Brown for the aforesaid improvements erected by him upon the said premises or the value thereof.

XVI.

That no part of said sum of twenty-eight thousand four hundred and sixty and 59/100 ($28,460.59) dollars, paid as aforesaid to defendant on account of said purchase price, or interest due thereon, has been repaid by defendant to plaintiff or to plaintiff's assignors, or at all; that no part of said sum of forty thousand ($40,000) dollars, expended as aforesaid in making improvements on said property, or any interest due thereon has been repaid to plaintiff or to plaintiff's assignors, or at all, and that the whole of said respective amounts, together with interest thereon, is now due and owing from defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of sixty-eight thousand four hundred and sixty and 59/100 dollars, with interest and costs of suit.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff.

Of Counsel. [8]

State of California,
City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of the plaintiff corporation in the above-entitled action, and that he makes this affidavit for and in its behalf.

That he has read the foregoing first amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 11th day of January, 1915.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California. [9]

Exhibit "A" to Amended Complaint—Contract.

Lakeport, Cal., September 20, 1906.

In consideration of Thirty Five Hundred ($3500) Dollars, the receipt of which is hereby acknowledged, as payment on account of the purchase price herein provided for HEINZ SPRINGE, of the County of Lake, State of California, hereinafter designated as the Seller, promises and agrees to sell to L. J. Shuman, or his assignee, hereinafter designated as the purchaser, for the sum of Fifty-five thousand ($55,000) Dollars, upon the terms and conditions

herein mentioned all the personal property described in Schedule "A" hereunto attached and hereby referred to and made a part hereof, and all that certain tract of land situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows to wit:

The northeast quarter; the southeast quarter; the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 21; the south half of section 22; the southwest quarter of the southwest quarter of section 23; the northwest quarter, the southwest quarter of the northeast quarter, and the fractional north half of the southwest quarter of section 23; the fractional north half of section 27; the fractional north half of section 28; and the fractional east half of section 29, lying east of slough; all in township 15 north, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said township 15 north, Range 9 West, to wit:

The southwest quarter of northeast quarter; the east half of northwest quarter, Lot 2, the east half of the southwest quarter of northwest quarter, and also a part of lot 1, commencing at the northeast corner thereof, running thence west 10 chains, thence south to the meander line of Clear Lake; thence southeasterly along said meander line to the southeast corner of said Lot 1, and thence north to the place of beginning.

Also that certain tract of land situate in the County of Lake, State of California, and being lots

3, 4, 9 and 12 of Section 6, township 15 north, range 8 west, M. D. M. containing about one hundred and seventy-eight (178) acres of land.

It being expressly understood that the northeast quarter of northeast quarter of said section 21, township 15 north, range 9 west, M. D. M., containing 40 acres of land, and embraced in the above description, is unpatented land, but has been paid for to the State of California, in full, and that patent will be secured as soon as possible.

The seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said abstract within which to examine title. Objections to the title, if any, shall be reported to the seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The Seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not [10] to exceed ninety days after the receipt by the seller of said written report, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price. But if the sale herein provided for is

not consummated under the terms and conditions of the agreement by reason of the failure of the purchaser to pay the balance of the purchase price when due as herein provided, then the sums of money paid the seller on account of the purchase price and interest thereon shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all further obligation in law and equity, to convey said lands, and may, at once, take possession thereof, and re-rent the same.

The balance of the purchase price, the sum of Fifty-one thousand five hundred ($51,500) Dollars shall be paid as follows:

I. The sum of thirteen thousand ($13,000) Dollars shall be paid on the 15th day of December, 1906. It is understood and agreed that this payment includes a payment of five thousand dollars ($5000) on account of the purchase price of the land above described, and eight thousand ($8,000) Dollars as the purchase price of the stock and other personal property herein agreed to be sold.

II. The further sum of Five thousand ($5,000) Dollars shall be paid on the 15th day of March, 1907.

III. The further sum of Five thousand ($5,000) Dollars shall be paid on the 15th day of June, 1907.

IV. A final payment of twenty-eight thousand five hundred ($28,500) Dollars shall be paid on September 15th, 1907.

The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above described parcels of land and payment of said last installment of twenty-eight thousand five

hundred ($28,500) Dollars of the purchase price are concurrent conditions.

It is understood and agreed that all deferred payments shall bear interest from date until time of payment at the rate of six and one half (6½) per cent. per annum and that said interest shall be paid quarterly, commencing with the 15th day of December, 1906, and which said interest payments are as follows, to wit:

The sum of Seven hundred ninety and 40/100 ($790.40) Dollars on December 15th, 1906;

The sum of Six hundred twenty-five and 62/100 ($625.62) Dollars on March 15th, 1907.

The sum of Five hundred forty-four and 57/100 ($544.57) Dollars on June 15th, 1907; and

The sum of Four hundred sixty-three 12/100 (463.12) Dollars on September 15th, 1907. [11]

It is understood and agreed that the seller shall deliver possession of all the property herein agreed to be sold at the time of making the payment of Thirteen thousand ($13,000) Dollars on December 15th, 1906, but any loss or damage thereto after the date hereof, shall be at the risk of the purchaser. None of the said property hereafter shall be removed from said premises by said seller, but he shall be permitted to use all necessary firewood for his own domestic purposes, and shall also have the right to the milk from the cows now being milked on said Ranch, up to the 15th day of December, 1906.

The purchaser agrees to pay the salary of the present foreman of said Carson Rancho (or should he leave such other foreman as may be selected by the

seller) the sum of Sixty ($60) dollars per month from the day of this agreement until said 16th day of December, 1906.

It is agreed between the parties hereto that taxes for the present fiscal year commencing on the first day of July, 1906, shall be prorated between the parties hereto in proportion to the length of their several possessions of the land, that is to say, the seller agrees to pay his *pro rata* of said taxes computed from the first Monday of March, 1906, up to the 15th day of September, 1906, and the purchaser agrees to pay all taxes after that date.

It is also understood and agreed that the purchaser shall hereafter bear the cost of necessary repairs, and of such improvements as to which he may consent.

The seller agrees to pay portions of the property herein agreed to be sold to such persons as may be named by the Purchaser upon payment to the seller of one hundred and fifty dollars ($150) per acre, if the tract so to be conveyed is situate in either of sections 27, 28, or 29, and that part of section 26, as hereinafter provided, or if the tract so to be conveyed is situate elsewhere, upon the payment of Ten ($10) Dollars per acre; but it is expressly provided that the tracts of land so to be conveyed shall contain at least one hundred (100) acres each and that tracts shall only be sold and conveyed in the following manner and parcels, to wit:

The FIRST tract to be sold shall be as follows:

The south half of northwest quarter of northwest quarter; the west half of southwest quarter of north-

east quarter of Section 26, also beginning at the northwest corner of Lot One (1) of said section 26, and running thence east ten chains, thence south to the meander line of Clear Lake, thence northwesterly along said meander line to the southwest corner of said Lot One (1) and thence north to beginning; Lot four (4) and the south half of northeast quarter of northeast quarter of section 27.

All being in township fifteen (15) north, range nine (9) west, M. D. M., containing in all 106 acres, more or less.

THEREAFTER no tract or tracts shall be sold and conveyed in said sections 27, 28 and 29, unless it be contiguous and adjoin to a tract of land already conveyed, and must contain at least 100 acres in each tract, and must be in compact parcels of even width and running directly back from the meander line of Clear Lake to the north line of said sections 27, 28 and 29; that is to say it is intended, that all of the lands situate in [12] said section 27 contiguous to said last above-described tract and running to the north line of said Section 27, shall next be sold before any other lands.

It is also agreed between the parties hereto that the purchaser may take any payments or any portion of any payments before they become due under the terms of this agreement; and that all payments made under the terms of this contract are to be considered as being made on account of the payment then due, or if no payment is then due, on account of the payment next becoming due under the terms of this agreement; but it is expressly understood that the interest installments shall be paid in full as herein-

above provided and that any payments made before they become due hereunder shall not affect or reduce said interest.

It is understood and agreed by and between the parties to this agreement that it is the intention of the seller to sell and of the purchaser to buy all of the real property and property rights of every kind and nature whatsoever owned by the seller, and situate in the County of Lake, State of California, excepting only the lands heretofore described as being excepted from the Carson Rancho, and situate in said Section 26; and it is agreed that any real properties situate in the County of Lake owned by the seller shall be deemed to be and be covered by this agreement though said real properties are not specifically described herein.

Time is made the essence of these agreements.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 20th day of September, 1906.

Executed in triplicate.

HEINZ SPRINGE. (Seal)
L. J. SHUMAN. (Seal)

SCHEDULE "A."

All of the horses, cattle, hogs, farming implements, now situate and contained on the premises herein described, saving and excepting one horse named Mont Bello.

[Endorsed]: Filed Jan. 11, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

In the United States District Court for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Answer to Amended Complaint.

Now comes the defendant above named and for his answer to the amended complaint of plaintiff above named admits, denies and alleges as follows:

Answer to plaintiff's first count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that behalf, and placing his denial upon that ground denies that the plaintiff now is, or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of the laws of the State of Arizona, or at all is a corporation.

II.

Admits that this defendant was absent from the State of California and from the United States of America at the time of the commencement of this action, but denies that he was absent from the State of California or from the United States of America, from the 21st day of January, 1908, until the com-

mencement of this action, or otherwise or at all, except that he was absent from said State of California and from the United States of America from the 14th day of December, 1908, to and including the time of the commencement of this action. [14]

III.

Denies that heretofore, to wit, on the 5th day of June, 1908, or otherwise or at all, the defendant became or was indebted to one Edward O. Allen in the sum of $68,460.59, or in the sum of any number of dollars, or was at all indebted to said Edward O. Allen for moneys had or received by defendant to or for the use of said Edward O. Allen within twenty months prior to the said 5th day of June, 1908, or was otherwise or at all indebted to said Edward O. Allen.

IV.

Denies that the defendant promised to pay said or any sum. Denies that any demand has been made upon the defendant by said Edward O. Allen or by the plaintiff for the payment of said or any sum, and denies that the whole or any part of said or any sum, or together with interest thereon, is now or at all was due or owing or unpaid.

V.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that behalf, and placing his denial upon that ground denies that on the 24th day of April, 1913, or at any time or at all, the said Edward O. Allen assigned or transferred the said or any claim unto this plaintiff, or that

plaintiff ever since or at all has been or continues to be, or now is, the lawful or any owner or holder thereof.

Answer to plaintiff's second count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that regard, and placing his denial upon that ground denies that the plaintiff now is, or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of the laws of the State of Arizona, or at all is a corporation. [15]

II.

Denies that ever since the 21st day of January, 1908, or otherwise or at all than since the 14th day of December, 1908, the defendant has been, up to the time of the commencement of this action, continuously absent from the State of California or from the United States of America.

III.

Denies that on the 28th day of May, 1908, or at any time or at all defendant became or was indebted to one J. Dalzell Brown in the sum of forty thousand dollars ($40,000), or in any number of dollars, or was at all indebted to said J. Dalzell Brown, for moneys paid by the said J. Dalzell Brown for the use of defendant or at defendant's request or otherwise or at all, within twenty months or any number of months or at all prior to said 5th day of June, 1908, or other time or at all.

IV.

That the defendant has no information or belief upon the subject sufficient to enable him to answer the allegations of the amended complaint in that regard, and placing his denial upon that ground denies that thereafter on said 28th day of May, 1908, or at any time or at all, or prior to the commencement of this action, the said claim of said J. Dalzell Brown against this defendant was transferred or assigned by the said J. Dalzell Brown to one Edward O. Allen, or that thereafter, to wit,, on the 24th day of April, 1914, or at any time or at all, the said Edward O. Allen assigned or transferred the said claim unto this plaintiff, or that plaintiff ever since or at all has been or continues to be, or now is, the lawful owner or any owner or holder thereof; denies that the defendant promised to pay said or any sum; and denies that any demand has been made upon the defendant for said sum or any sum; and denies that the whole or any part of said or any sum, or together with interest thereon, is now due or owing or unpaid. **[16]**

Answer to plaintiff's third count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that regard, and placing his denial upon that ground denies that the plaintiff is now or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of

the laws of the State of Arizona, or at all is a corporation.

II.

Denies that defendant was or ever since the 21st day of January, 1908, or at any time other than since the 14th day of December, 1908, up to the time of the commencement of this action, has been continuously or at all absent from the State of California or from the United States of America.

III.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegations in plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that prior to the 18th day of December, 1907, or at any time or at all one J. Dalzell Brown had expended in making improvements upon the premises referred to in plaintiff's amended complaint on file herein, and described in Exhibit "A" to plaintiff's said complaint, the sum of forty thousand dollars ($40,000) or any sum in excess of thirty thousand dollars ($30,000); and defendant denies that said alleged improvements so constructed upon said premises by the said Brown referred to in paragraph VII of plaintiff's third count in its amended complaint are now or at any time have been of the value of forty thousand dollars ($40,000), or of any value in excess of five thousand dollars ($5,000) to this defendant, or at all of any value in excess of five thousand dollars ($5,000). **[17]**

IV.

Denies that the or any of the objections to the

title to the real property reported by said J. Dalzell Brown to the defendant, as set forth in paragraph VIII of plaintiff's third purported cause of action, on page 5 of its amended complaint, constituted or referred to any defects in defendant's title to said real property which rendered the title of the defendant to the property described in the written agreement referred to in said amended complaint, a copy of which is thereto attached and marked Exhibit "A," unmerchantable; denies that the defendant at any time agreed with said J. Dalzell Brown that said obections or any of them so reported in writing to the defendant constituted defects in defendant's title, or that any of said purported defects in title rendered the title of the defendant to said real property unmerchantable; denies that said defendant undertook or agreed with said Brown to remove any alleged defects in defendant's title to said lands, except that the defendant admits that he informed said J. Dalzell Brown that he would, in so far as he was able, cure any of the objections to defendant's title reported in writing to the defendant.

V.

Denies that the defendant did not remove the said defects in title within a period of ninety days after the receipt by defendant of said written report, except that this defendant admits that he did not cure certain of the objections to defendant's title reported in writing to the defendant as aforesaid, within said ninety days; but denies that any of said objections to title so reported in writing to the defendant

which were not removed within the period of ninety days after the receipt of said written report, constituted or were defects in defendant's title which rendered the title of the defendant to said real property unmerchantable; denies **[18]** that after the expiration of said period of ninety days or any time or at all the said Brown, at the instance or request of said defendant, or otherwise or at all, agreed to or did extend the time of defendant for the removal of said or any defects, or both or either of the parties to said agreement agreed that said defendant should have a reasonable or any further time in which to remove said or any defects; and denies that the defendant at any time requested the said Brown to extend defendant's time to remove any alleged defects in defendant's said title, or any objections to said title so reported in writing to the defendant.

VI.

Admits that on or about the 12th day of September, 1907, said J. Dalzell Brown, at the request of defendant, waived in writing a tender by defendant of a deed of the said premises referred to in plaintiff's said complaint on the 15th day of September, 1907, but denies that the defendant, in consideration of said waiver, or otherwise or at all, covenanted or agreed with said Brown, or at all, that he, said defendant, would proceed with diligence, or would at all proceed to remove or would cause to be removed or cured the or any defects in defendant's title so or at all specified in said written objections; or that at the earliest possible day thereafter, or

otherwise or at all, he, the defendant, would cause to be delivered, a good or sufficient deed conveying the said property to said Brown free from the aforesaid or any defects, or otherwise or at all agreed, except as set forth in the said written agreement between defendant and said L. J. Shuman, a copy of which agreement is appended to plaintiff's said amended complaint and marked Exhibit "A," and by reference made a part of this answer. Denies that said Brown or defendant then or there or at all agreed that the balance of said purchase price called for by said contract of sale, a copy of which is attached to plaintiff's said complaint and marked Exhibit "A," should be paid by said Brown to defendant **[19]** concurrently with the delivery by said defendant to said Brown of such deed, or otherwise or at all, except as in said contract of sale of date September 20, 1906, set forth and as may be hereinafter in a further and separate answer alleged.

VII.

Denies that the defendant did not proceed with any diligence to remove or cure, or never has removed or cured, the said defects, and denies that the said defendant has at all times or at all failed or neglected to cause the same to be removed or cured, and denies that the same never have been removed or cured. Denies that the defendant has not at any time delivered or offered to deliver to said Brown a good or sufficient deed of grant, bargain or sale covering or conveying to said Brown the title to the above-described parcels of land or the

lands referred to in said Exhibit "A" to plaintiff's said amended complaint.

VIII.

Denies that on or about the 18th day of December, 1907, or at any time, or without giving to said Brown any notice, reasonable or otherwise, of his intention to make time again or at all of the essence of said or any agreement, or without making said Brown a legal or any tender of a good or sufficient deed of grant, bargain or sale of said premises, or without removing the said or any defects rendering said title unmerchantable, the said defendant notified said Brown that he would not be bound by the said contract Exhibit "A," or by any of the provisions or by the aforesaid or any modifications thereof, or demanded the possession of said property from the said Brown, or brought an action of ejectment against the said Brown to recover the possession thereof, or thenceforth or at all repudiated the aforesaid contract or agreements or abandoned the same or treated the same as rescinded, or otherwise or at all except as hereinafter alleged in one of [20] defendant's further and separate answers to plaintiff's amended complaint.

IX.

That defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of plaintiff's amended complaint in that regard, and placing his denial upon that ground defendant denies that thereafter or pending said action in ejectment or at all the said Brown transferred or assigned to one Edward O. Allen the said

contract, a copy of which is annexed to plaintiff's amended complaint and marked Exhibit "A," or together with all or any claims, rights or interests of every or any kind or character which had accrued, or could or might thereafter accrue by reason of the aforesaid or any agreements, acts or transactions.

X.

Denies that thereafter or pending the said action of ejectment or at all the said Allen elected to treat, or did thereafter or at all treat the said or any acts or conduct of the defendant, beginning with the 18th day of December, 1907, or at any other time, as an offer to rescind said contract or agreements, or any of them, or as a rescission thereof, or thenceforth, or at all treated said contract or agreements, or any of them, as rescinded, or caused to be surrendered up to said defendant the possession of said premises described in the said agreement; or that defendant received or accepted or resumed the possession of said premises from plaintiff on or about the 3d day of June, 1908, or at all.

XI.

That defendant has no information or belief upon the subject sufficient to enable him to answer the allegations of plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that thereafter and on the 24th day of April, 1914, or at any time or at all, or prior to the commencement of this [21] action, said Edward O. Allen transferred or assigned to this plaintiff all or any of his rights, claims or interests, of every or

fects making defendant's title to said real property unmerchantable.

VI.

That thereafter and on or about the 15th day of December, 1906, the said J. Dalzell Brown paid to this defendant the first deferred payment referred to in said contract, namely, the sum of thirteen thousand dollars ($13,000), and that thereupon the said defendant delivered over to said J. Dalzell Brown, as assignee of said L. J. Shuman, the possession of the real property referred to in said Exhibit "A," also all of the horses, cattle, hogs and farming implements referred to in said contract, [23] save and except one horse "Monte Bello," then belonging to the defendant and being upon said real property, which said personal property was of the then agreed value and sale price, pursuant to the terms of said contract, of eight thousand dollars ($8,000) and that eight thousand dollars ($8,000) of said thirteen thousand dollars ($13,000) so paid to the defendant on said 15th day of December, 1906, together with interest thereon at the rate of 6½% per annum from said 20th day of September, 1906, was paid to the defendant as the agreed purchase price of said personal property referred to in said contract, a copy of which is marked Exhibit "A" as aforesaid.

VII.

That thereafter and within ninety days from and after the date of said J. Dalzell Brown reported to this defendant his said written objections to defendant's said title, defendant caused to be cured

of record certain of the said purported objections to defendant's said title; and thereupon, and on or about the 1st day of May, 1907, the said J. Dalzell Brown, assignee of said contract of said L. J. Shuman, as aforesaid, and as such assignee, elected to insist and did insist upon the specific performance by the defendant of his seller's agreement to sell to the said J. Dalzell Brown as assignee of said L. J. Shuman, as aforesaid, the real and personal property in said agreement referred to, at the price and upon the terms of sale in said contract set forth. And said J. Dalzell Brown did thereupon waive each and all of his said objections to defendant's title to said real property theretofore reported to defendant as aforesaid, and he, the said Brown, did then and there notify the defendant that he so elected to purchase said real and personal property at the price in said contract of sale set forth, notwithstanding any purported defects in defendant's record title thereto, and that he did then waive all defects in said title theretofore [24] reported to defendant. But said Brown then requested the defendant to continue his efforts to remove, in so far as he should be able, the purported defects in the title which had been reported by him to the defendant, which same, the defendant stated to said Brown, he would do, and that the defendant did continue to remove and did remove prior to the 15th day of September, 1907, all said purported defects in his said title, so far as he was able.

VIII.

That thereafter said J. Dalzell Brown paid to the

said defendant, pursuant to the terms of said contract of sale, each and all of the installment payments or principal and interest required to be paid by the purchaser to the defendant pursuant to the terms of said contract, at the times in said contract provided, save and except that the said J. Dalzell Brown at all times has failed, neglected and refused to pay to the defendant the final payment of twenty-eight thousand five hundred dollars ($28,500) together with interest, required by the terms of said contract of sale to be paid to the defendant on the 15th day of September, 1907.

IX.

That on or about the 18th day of June, 1907, the said J. Dalzell Brown requested the defendant to prepare, execute and acknowledge his grant, bargain and sale deed conveying to California Industrial Company, a corporation, the real property referred to in said contract of sale executed between the said defendant and said L. J. Shuman of date September 20, 1906, and assigned to the said J. Dalzell Brown as aforesaid, and to deliver said deed to the said J. Dalzell Brown on the 15th day of September, 1907, upon the payment to the defendant, by the said J. Dalzell Brown, of the said final payment of twenty-eight thousand five hundred dollars ($28,500) and interest, referred to in said contract of sale. That thereupon said defendant caused to be prepared, ready for execution, the said grant, bargain and [25] sale deed conveying said real property to said California Industrial Company, and did thereupon submit the same to the said

J. Dalzell Brown for approval, and that the said J. Dalzell Brown did, on or about said June 18, 1907, approve said form of deed, whereupon the same was transmitted to the said defendant at Paris, France, for execution and acknowledgment, and the same was by the said defendant, on or about the 13th day of August, 1907, executed and acknowledged by him and deposited in the mails addressed to The Donohoe, Kelly Banking Company, a banking corporation, at San Francisco, California, for delivery to said J. Dalzell Brown on the 15th day of September, 1907, upon the payment to said banking company for said defendant of the sum of twenty-eight thousand five hundred dollars ($28,500) together with $463.12 interest, all in accordance with said contract of sale hereinabove referred to.

X.

That thereafter and on or about the 30th day of August, 1907, said deed from said defendant to the said California Industrial Company was received at San Francisco, California, by the said The Donohoe, Kelly Banking Company. That thereupon said The Donohoe, Kelly Banking Company notified said Brown that the said deed from the defendant to said California Industrial Company was lodged with it for delivery to him, said Brown, upon the payment of said final payment of principal and interest pursuant to the said contract of sale of the 20th day of September, 1906, and thereupon the said Brown informed the said The Donohoe, Kelly Banking Company that he now desired the said deed to said real property to be made to him, the said J. Dalzell

Brown personally, and not to the said California Industrial Company; and the said Brown thereupon requested the defendant, through said The Donohoe, Kelly Banking Company, to execute a new deed to said property to him, the said J. Dalzell Brown, as grantee, in place and instead of to said California Industrial Company; that the said **[26]** defendant, through his agent at San Francisco, defendant then being in Paris, France then requested the said J. Dalzell Brown to sign a waiver of the production and tender of a deed to said real property on the 15th day of September, 1907, pursuant to the terms of said contract of sale of date the 20th day of September, 1906, in order that the defendant might have an opportunity to execute a new deed in Paris, France, and to transmit the same to San Francisco for delivery upon payment of said final installment of principal and interest; and thereupon, upon the request of the defendant, as aforesaid, and for no other purpose, said Brown did sign and deliver to the defendant such waiver, which is in words and figures following:

"San Francisco, Cal., Sept. 12, 1907.

Mr. Heinz Springe,
c/o Eugene Levy, Esq.,
San Francisco, Cal.

Dear Sir:

With reference to the contract for purchase and sale entered into between yourself and L. J. Shuman, wherein you agreed to convey your Lake County property, with certain exceptions, to Mr. Shuman, or his assignee, I beg to confirm the statement al-

ready made that I am Mr. Shuman's assignee.

I understand that Mr. Springe is now in Paris; that he has signed and acknowledged a deed conveying the property described in the contract with Mr. Shuman to the California Industrial Company, and that this instrument is now in San Francisco; and that Mr. Springe has in San Francisco no attorney in fact.

In confirmation of the understanding reached between Mr. Levy and Mr. Gray, I hereby waive the production of a deed from Mr. Springe to myself on the day specified in the contract between yourself and Mr. Shuman, the understanding between us being that you will with all diligence cause to be delivered to me upon payment of the balance of the purchase price due a proper deed conveying the property under consideration to myself.

Respectfully yours,

(Signed) J. DALZELL BROWN."

XI.

That thereafter, pursuant to the request of said J. Dalzell Brown, said defendant did execute and acknowledge, in [27] Paris, France, and did transmit to The Donohue, Kelly Banking Company, at San Francisco, California, for delivery to said J. Dalzell Brown, a grant, bargain and sale deed from the defendant as grantor to the said J. Dalzell Brown, as grantee, of the real property, and of the whole thereof, described in said contract of sale. That said Bank did thereafter, on the 28th day of October, 1907, notify said J. Dalzell Brown of the receipt of said deed by it, and that it was ready to

deliver said deed to said Brown upon the payment by him to said bank of the sum of $28,500 and interest to said date in the sum of $657.67.

XII.

That on the 29th day of October, 1907, Charles A. Gray, Esq., an attorney at law, of the law firm of Gray & Cooper, having offices in San Francisco, California, and who then was the agent for said Brown for that purpose, and as such agent, and at the request of said Brown, called at the banking rooms of said The Donohoe, Kelly Banking Company, at San Francisco, California, and did thereupon examine said deed and did thereupon state to said bank that said deed was all right and satisfactory to the said J. Dalzell Brown.

XIII.

That at all the dates and times herein mentioned said J. Dalzell Brown was the vice-president and manager of California Safe Deposit and Trust Company, a banking corporation, having its principal office and place of business in San Francisco, California, and that on the following day, to wit, the 30th day of October, 1907, the said California Safe Deposit and Trust Company suspended payment and closed its doors, and was shortly thereafter placed in the hands of a receiver and went into liquidation.

XIV.

That on the 29th day of October, 1907, during business hours, said defendant, through his agent, said The Donohoe, [28] Kelly Banking Company, made a tender, at San Francisco, California, to said J. Dalzell Brown of the said deed from the defend-

ant to said J. Dalzell Brown of the said real property, which deed had been approved as all right and satisfactory by the said J. Dalzell Brown, by his agent as aforesaid, and which deed was in all respects a good and sufficient grant, bargain and sale deed conveying the legal title to said real property to said J. Dalzell Brown.

That upon making such tender the said defendant then and there demanded of said J. Dalzell Brown the payment of the amount then due said defendant under the terms of said contract of sale dated September 20, 1906, as aforesaid. That said Brown thereupon refused and neglected to make such or any payment.

That said Brown made no objection to said tender or to the mode thereof, or to said deed, and made no objection to the sufficiency of defendant's title to the real property in said deed described, and made no objection to the money demand of the defendant, but refused and neglected to pay said amount so demanded or any part thereof; that said Brown then and there gave as his only reason for his failure to make the payment so demanded that he had no money and was unable to make such payment.

XV.

That thereafter, on the 17th day of December, 1907, at the city and county of San Francisco, California, during business hours, said defendant did cause to be tendered to said J. Dalzell Brown the said deed tendered to said Brown on the 29th day of October, 1907, as aforesaid. That said J. Dalzell Brown was then confined in the city prison of the

city and county of San Francisco, at 64 Eddy Street, San Francisco, California, and that a tender of said deed was then and there made to the said J. Dalzell Brown and a demand was then made upon him to pay the defendant, simultaneously with the delivery of said deed by the defendant, the sum of $29,461.81, pursuant to the terms of said [29] contract of sale of date September 20, 1906.

That said Brown then and there waived any reading of said deed and stated that he was unable to make any payment for said deed, that he was endeavoring to get an extension of time within which to make such payment, which payment he hoped to be able to make in six months.

XVI.

That at the time of the last-mentioned tender said J. Dalzell Brown made no objection to the method of said tender or to the form or sufficiency of said deed, and he made no claim that there were any defects in defendant's title to said real property; he made no objection to the amount of defendant's demand for money, and made no objection to said tender.

XVII.

That said Brown has not nor has any other person at any time paid or tendered any portion of said last-mentioned installment of principal and interest pursuant to the terms of said contract of date September 20, 1906, and the same and the whole thereof remains wholly unpaid.

XVIII.

That on or about the 16th day of January, 1908,

the said J. Dalzell Brown was in the possession of the said real property, and of the whole thereof, described in said Shuman contract of date September 20, 1906, and thereupon the said defendant, at the said city and county of San Francisco, made demand upon the said Brown that he surrender the possession of said lands and premises, and the whole thereof, to this defendant because of the failure of the said J. Dalzell Brown to make payment of the last installment of the purchase price of said lands pursuant to said Shuman contract of date September 20, 1906, upon tender of deed and demand for said moneys as aforesaid, but that the said Brown then and there refused to surrender the possession of said lands to this defendant, [30] he then representing to this defendant that he had given Central Counties Land Company, a corporation, options to purchase said lands from him, and that if the defendant would refrain from recovering possession of the property that he, the said Brown, would be able to complete his payments for the property in a few months; that the defendant thereupon refused to grant the said Brown any extension of time within which to make said payments.

XIX.

That thereafter on the 16th day of January, 1908, at the county of Lake, State of California, this defendant brought an action herein as plaintiff against the said J. Dalzell Brown in the Superior Court of the said county of Lake, said State of California, said action being entitled, "In the Superior Court of the State of California, in and for the county of

Lake, Heinz Springe, plaintiff, vs. J. Dalzell Brown, John Doe Simons and Alfred White (hereby sued by fictitious names), defendants," same being Superior Court No. 1789, said action being an action in ejectment against the said J. Dalzell Brown and certain other persons to eject the said J. Dalzell Brown and said other persons from the possession of the real property described in said sales contract of date September 20, 1906, and for the possession of said real property.

That appended hereto is a copy of said defendant's complaint in ejectment in said last-mentioned action, which copy of complaint is marked Exhibit 1 and by reference made a part of this answer.

XX.

That thereafter, on or about the 27th day of April, 1908, said J. Dalzell Brown appeared in said last-mentioned action by his attorney at law, Edward O. Allen, the purported assignor of the plaintiff herein, and filed his verified answer in said action, [31] a copy of which answer is hereto attached, marked Exhibit 2 and by reference made a part of this answer.

XXI.

That thereafter and on or about the 23d day of May, 1908, Central Counties Land Company, a corporation, leave of Court first having been asked and obtained, filed in said suit in ejectment its complaint in intervention, a copy of which is hereto attached, marked Exhibit 3 and by reference made a part of this answer. That this defendant made and filed in

said action his answer to said complaint in intervention.

XXII.

That thereafter said ejectment suit came on for trial on the 25th day of May, 1908, before said Superior Court of the county of Lake, all parties thereto appearing in person or by counsel, and said cause having been tried before said Court, and the Court having considered the law and the evidence, made, entered and filed, on the 26th day of May, 1908, in said Court and action its decision and findings of fact and conclusions of law, copies of which are hereto annexed, marked Exhibit 4 and by reference made a part hereof.

XXIII.

That thereafter, on the 26th day of May, 1908, there was duly made and entered in said ejectment suit the judgment of said last-mentioned Court in said action, a copy of which judgment is hereto attached, marked Exhibit 5 and by reference made a part hereof. That said judgment was duly given and made against the defendants therein named, including the said defendant, J. Dalzell Brown, one of the assignors of the plaintiff herein. That said judgment has not been set aside, modified or reversed, and no appeal has been taken therefrom, and that the same remains in full force and effect. [32]

XXIV.

That on or about the 1st day of February, 1908, said J. Dalzell Brown, but without the knowledge or consent of this defendant, delivered over the possession of said real property, and of the whole thereof,

described in said Shuman contract with this defendant of date September 20, 1906, to said Central Counties Land Company, a corporation, and that said Central Counties Land Company remained in possession of said real property and premises until on or about the 3d day of June, 1908, when the said Central Counties Land Company, pursuant to said decision and judgment rendered in said ejectment suit, referred to in paragraph XXIII hereof, and not otherwise, delivered up the possession of said real property and premises to this defendant, and that this defendant has at all times since said June 3, 1908, been in the exclusive possession of said real property and of the whole thereof, claiming the right of possession thereto and to own a fee simple title thereto adverse to all the world.

That neither the said J. Dalzell Brown nor any other person except the said Central Counties Land Company at any time offered to deliver up or did deliver up to this defendant the said real property and premises.

XXV.

That at all the dates and times in paragraphs XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXIV of this further and separate answer set forth Edward O. Allen, the purported assignor of the plaintiff herein, was an attorney at law and attorney of record for the said J. Dalzell Brown as defendant in said ejectment suit, also of said Central Counties Land Company, as intervenor in said ejectment suit, and also of said J. W. Simons as defendant in said ejectment suit, and appeared in said eject-

ment suit and upon the trial thereof as attorney for said last-named defendants and intervenor. [33]

XXVI.

That at all the dates and times herein mentioned the defendant duly kept and performed all the terms, covenants, conditions and provisions in said contract of September 20, 1906, on his part to be kept and performed.

XXVII.

That this defendant has never rescinded or offered to rescind said contract of sale of September 20, 1906, but on the contrary has at all times and to all persons asserted and maintained that said defendant stood and was standing upon said sales contract of September 20, 1906; and that this defendant made the said tenders of said deed to the said J. Dalzell Brown and brought said suit in ejectment and prosecuted the same to judgment, and took possession of said real property, all in pursuance of and in reliance upon the terms, conditions and provisions of said contract of sale of September 20, 1906, and not otherwise.

XXVIII.

That at all the dates and times herein mentioned between the dates of October 30, 1907, and July 1, 1908, the said J. Dalzell Brown, also the said Central Counties Land Company, were wholly without funds with which to pay the whole or any substantial part of the last installment of $28,500 and interest required by the terms of said sales contract of date September 20, 1906, to be paid to the defendant, and

that the failure of said J. Dalzell Brown also said Central Counties Land Company to pay or to tender payment to the defendant of the said sum of $28,500 and interest, at the times of the demands made upon said J. Dalzell Brown, as aforesaid, was due to the inability of said J. Dalzell Brown, also said Central Counties Land Company, to obtain moneys with which to make such payment.

AND FOR A SECOND, FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S SAID AMENDED COMPLAINT AGAINST THE DEFENDANT, THIS DEFENDANT ALLEGES AS FOLLOWS, TO WIT: [34]

I.

Defendant hereby refers to and makes a part of this answer and defense all of paragraphs numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of defendant's first and separate answer and defense to plaintiff's amended complaint herein, and defendant hereby repeats and alleges everything in said paragraphs contained and prays that the same be taken as and deemed a part of this answer and defense as though the same was herein set out at length.

II.

That on the 14th day of December, 1907, the said J. Dalzell Brown made and entered into with Central Counties Land Company, a corporation organized and existing under and by virtue of the laws of the State of California, a contract for the sale of

1,700 acres of the lands described in said sales contract of September 20, 1906, a copy of which agreement is as follows, to wit:

"OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars ($1000) to me paid, the receipt whereof is hereby acknowledged, I, L. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date thereof for the additional sum of Sixty Seven Thousand ($67,000) Dollars all that property, containing seventeen hundred (1700) acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M., lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN on the part of HEINZ SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be made as follows to wit: namely the sum of Thirty Thousand Dollars ($30,000) in United States Gold Coin, and the balance of Thirty Seven Thousand Dollars ($37,000) in authorized debenture certificates of said Central Counties Land Company at par value, to wit, $500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain and sale deed conveying a good title to the above described property, free and clear of all liens and incumbrances.

San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown.

EDWARD O. ALLEN." [35]

III.

That on the 14th day of December, 1907, said J. Dalzell Brown entered into with said Central Counties Land Company a contract for the sale of the remainder of said real property described in said sales contract of September 20, 1906, a copy of which agreement is in words and figures following:

"OPTION.

In consideration of the sum of One Thousand ($1000) Dollars, to me paid, the receipt whereof is hereby acknowledged, I, J. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or to its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Four Thousand ($64,000) Dollars, the remaining part of my property, containing Two Hundred and Fifty (250) Acres, more or less, on Clear Lake, California (sold to me by Heinz Springe under that certain contract dated September 20th, 1906, between said Springe and L. J. Shuman), not otherwise agreed to be sold to Central Counties Land Company under that certain option and agreement, dated September 20th, 1907, for the sale of 1700 acres of said property; payment of said amount of $64,000 to be made as follows, to wit, namely: Said Central Counties Land Company shall assume the satisfaction of all liens levied against said property

in relation to the construction of certain improvements thereon; said company shall also within six months from date pay to me the sum of Twenty Thousand ($20,000) Dollars in U. S. Gold Coin and at the same time shall execute and deliver a mortgage on said 250 acres and improvements covering the balance of said $64,000 payable in two years and bearing interest at the rate of 6% net. Upon the payment of said amounts and the delivery of said mortgage within the period stated, and concurrently conditional therewith, I agree to deliver to the nominee of said Company a sufficient grant, bargain and sale deed, covering a good title to the above described property, free and clear of all liens and incumbrances.

San Francisco, Cal., December 14th, 1907.

J. DALZELL BROWN.

Witness to signature of J. Dalzell Brown:

EDWARD O. ALLEN."

IV.

That at no time prior to on or about the 21st day of April, 1914, did the said J. Dalzell Brown or the Central Counties Land Company or the said plaintiff herein, or any other person or [36] persons ever make any claim to the defendant that the said defendant had ever committed any breach of said contract of sale of date September 20, 1906, or at any time had failed to tender a good and sufficient deed conveying a merchantable title to said real property in said contract described, and pursuant to the terms thereof, or that the defendant in any manner whatsoever was in default in the performance of any

term, covenant or condition of said agreement; and at no time prior to on or about said 21st day of April, 1914, did any person make any demand upon this defendant for the return of any moneys paid out or expended by the said J. Dalzell Brown pursuant to said agreement of sale of September 20, 1906, or make any claim to the defendant that said agreement of sale had been rescinded by the defendant or by the said J. Dalzell Brown, or was considered rescinded by the said J. Dalzell Brown or by any person whomsoever, although this defendant remained in the State of California, and had his domicile in said State in the said County of Lake from on or about the 1st day of January, 1908, to and including on or about the 14th day of December, 1908, and at all the dates and times since said date has kept a care-taker on his lands in Lake County, California.

V.

That the real property described in said contract of sale of date September 20, 1906, at all the dates and times herein mentioned was and now is devoted principally to grazing, and is suitable principally for grazing purposes. That there is but a small portion of said land suitable for agriculture, and but a small portion of said lands have at any time been devoted to agriculture. That said lands border upon the shores of Clear Lake, situate in Lake County, California, which Lake is a navigable body of water, and that about three miles of the northerly shore of said Clear Lake is upon the said real property. [37]

VI.

That on or about the 20th day of September, 1906, the said J. Dalzel Brown and certain of his associates conceived a plan of acquiring all or practically all of the lands bordering upon the shores of Clear Lake, in Lake County, California, with the intent and purpose of organizing a corporation or corporations to engage in the business of erecting a dam at the lower end of said Clear Lake, thereby raising the mean level of the waters of said Clear Lake several feet, and then diverting said waters through motors so as to thereby generate electricity for power for distribution and sale to municipalities and individuals, also diverting said waters through canals and conduits upon the adjacent lands for irrigation purposes; and also with the intent and purpose of subdividing a large portion of said lands so bordering on said Clear Lake, including said lands of this defendant, and, after improving the same with roads and boulevards of a superior character, and otherwise beautifying the same, to thereupon place building restrictions upon said lands, and then sell the same to millionaires and other persons of great wealth as and for villa sites and country residences.

VII.

That in pursuance of said plan and scheme of the said J. Dalzell Brown and associates the said J. Dalzell Brown did, on or about the 20th day of September, 1906, obtain from the defendant, through L. J. Shuman, the agent of said Brown, the said contract of sale of date of September 20, 1906, and thereupon did cause his agent, said L. J. Shuman, to forthwith

assign the said agreement to him, the said Brown; and the said Brown did thereafter, on or about the 15th day of December, 1906, enter into possession of the lands in said contract described and did begin the erection of a villa or mansion upon a portion thereof which became known as and is now known as the "J. Dalzell Brown mansion."

That the said J. Dalzell Brown in erecting said mansion [38] had the twofold purpose of erecting a mansion to be used by him as his country mansion or estate, and also as the first one of a large number of similar mansions or villas which he desired erected by millionaires and other persons of great wealth who he, the said Brown, had in mind as prospective purchasers of said subdivisions of said lands.

VIII.

That from on or about the said 15th day of December, 1906, to on or about the 30th day of October, 1907, said J. Dalzell Brown prosecuted the erection of said mansion. That some time during the year 1907 and prior to the 30th day of October, 1907, said J. Dalzell Brown became insolvent and wholly unable to pay his debts as they accrued. That on or about the said 30th day of October, 1907, said J. Dalzell Brown was indebted in large sums of money for labor and material which had been used and expended upon said J. Dalzell Brown mansion, said indebtedness being in excess of $15,000, and that at no time since said October 30, 1907, was said J. Dalzell Brown able to pay said indebtedness.

IX.

That on or about the 10th day of December, 1907,

this defendant, who was then residing in Paris, France, was advised that said J. Dalzell Brown was insolvent and by reason of such insolvency had failed to make the final installment payment required to be made pursuant to the terms of said contract of sale of date September 20, 1906; and thereupon this defendant left his said residence in Paris, France, and came to California, at large expense to himself, to determine what action should be taken by him to enforce the said contract of sale of September 20, 1906, and to protect the said real property therein described. That the said defendant arrived in San Francisco, California, from Paris on or about the 1st day of January, 1908, and remained [39] in California during all the time thereafter until on or about the 14th day of December, 1908.

X.

That during said last-mentioned period mechanics' liens for labor and material were filed upon said Brown mansion and the real property described in said contract of sale in the sum of $15,000, approximately, for labor and materials furnished on said Brown mansion at the instance and request of said J. Dalzell Brown, and for which he was indebted, and that threats were made by the holders of said liens to foreclose said liens by the sale of said property; and this defendant, in order to protect his property from sale, and to remove said liens, was forced to pay, and did pay, the claims secured by said liens in the sum of approximately $15,000.

XI.

That the said J. Dalzell Brown continued work

upon the said Brown mansion until on or about the 30th day of October, 1907, and that at that time said building was but partially completed; and this defendant, during said period between the 30th day of November, 1907, and the 14th day of December, 1908, was compelled to expend, and did expend, in performing work and labor upon said Brown mansion, in enclosing the same and in protecting it from the weather, so that the same would not be destroyed and made worthless by the winter rains and the elements, the sum of more than $1500.

XII.

That said J. Dalzell Brown mansion has never been occupied or used as a residence by the said defendant or by any other person since its partial erection in 1907 as aforesaid, except that during a small portion of the time since then the defendant has maintained therein a keeper, who occupied a room; and, for a portion of said time, this defendant has camped in two of the forty or more rooms therein. [40]

That said Brown mansion is suitable only as a mansion for a personage of great wealth and ostentation, who can and is disposed to maintain therein an establishment on a very elegant and elaborate scale, with many servants, including gardeners, grooms, stable-boys, chauffeurs and others. That said mansion is built in a lonely spot, in a sparsely settled community, surrounded by mountains, remote from a great city, and remote from a railroad and all other great arteries of travel; that the inhabitants in the region in which it is built are for the most part

small farmers and stock-growers, of modest means and simple habits, who live in small and simple cottages; that there is no landed gentry or leisure class there.

That this defendant is a man of simple tastes and modest means, and said Brown mansion is wholly unsuited to the uses of a residence for the defendant or to the use of residence for any other person in its present location and in the present state of development of Lake County, California; and that to maintain it properly as a residence would entail far greater expense than the defendant's means would afford or permit, and any possible needs of the defendant or of the community would justify or warrant; and that said J. Dalzell Brown mansion stands now as an almost worthless memorial of the one time roseate dreams and imaginings of said J. Dalzell Brown, and of the wanton and extravagant expenditure of moneys by the said J. Dalzell Brown while manager of the now defunct California Safe Deposit and Trust Company of San Francisco, California.

XIII.

That the hope of the said J. Dalzell Brown to create a colony of millionaires and other persons of great wealth who would erect mansions and villas upon the lands of the defendant hereinabove described failed in toto, and that there were no mansions or villas or other expensive residences erected, and [41] that none are now maintained on or near the said lands of the defendant except the said Brown mansion unoccupied as aforesaid. That said Brown mansion in its present condition is wholly un-

suited for any purpose whatsoever and that the only use that the same can ever be put to, so far as this defendant is informed and believes and therefore alleges, is that of a hotel; but that there is at present no demand for a hotel on said lands, and that there may never be any such demand, and that to convert said Brown mansion into a suitable hotel building would entail the expenditure of a very large sum of money.

XIV.

And defendant avers and alleges that by reason of the facts in this further and separate answer alleged and set forth the said J. Dalzell Brown, also the said Central Counties Land Company, the said plaintiff, and all persons claiming any assignment of any rights whatsoever of the said J. Dalzell Brown under and pursuant to said sales contract of September 20, 1906, including the plaintiff herein, should be and are estopped from claiming or alleging or proving in said action the following, to wit:

(a) That the said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to insist that this defendant sell to him, the said Brown, pursuant to said contract of sale of date September 20, 1906, the lands therein described.

(b) That said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to waive any and all objections to defendant's title to the lands in said sales contract of September 20, 1906, described.

(c) That said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to accept the defendant's record title to said lands as a good and sufficient merchantable title thereto.

(d) That this defendant, on or about the 29th day [42] of October, 1907, also on or about the 17th day of December, 1907, did not tender to the said J. Dalzell Brown a good and sufficient grant, bargain and sale deed conveying a good merchantable title to all of the lands in said sales contract of September 20, 1906, described, in pursuance of and in accordance with the terms, conditions and provisions of said contract of sale; and that this defendant did not thereupon demand from said J. Dalzell Brown the final installment of the agreed sale price of said lands, all in accordance with said agreement of sale; and that the said Brown did not thereupon, and at all times subsequent thereto, fail, refuse and neglect to make such payment, and did not make default in such payment, and was not then guilty of a breach of said agreement of sale on his part as purchaser thereunder, and that he did not thereby become and was in default in his performance of said contract. That at the time of said tenders and each of them the said J. Dalzell Brown did make objection to the mode of said tender, and did make objection to the sufficiency of said deed to convey a good merchantable title to the lands therein described to the grantee therein named.

(e) That the defendant did commit a breach of said contract of sale of September 20, 1906, on or before the 26th day of May, 1908, by failing to tender to said J. Dalzell Brown a good merchantable title to the property described in said agreement of sale of September 20, 1906, and that the said defendant did rescind said agreement of sale and did notify

and represent to the plaintiff or to said J. Dalzell Brown or other person that he, the defendant, would not be bound by said agreement of sale or by any provisions thereof; that the defendant did repudiate said agreement of sale and did abandon the same, and has ever since treated the same as rescinded; and also that the said J. Dalzell Brown, also the plaintiff, and all persons claiming under the said J. Dalzell Brown, as assignee of said agreement [43] of sale of September 20, 1906, did rescind and did offer to rescind said agreement of purchase on or before the 26th day of May, 1908.

AND FOR A THIRD, FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S SAID AMENDED COMPLAINT AGAINST THE DEFENDANT, THIS DEFENDANT ALLEGES AS FOLLOWS, TO WIT:

I.

Defendant hereby refers to and makes a part of this answer and defense all of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of defendant's first and separate answer and defense to plaintiff's amended complaint herein, and defendant hereby repeats and alleges everything in said paragraph contained and prays that the same be taken as and *deed* a part of this answer and defense as though the same was herein set out at length.

II.

That between the dates December 15, 1906, and October 30, 1907, said J. Dalzell Brown caused to be

erected upon the real property in said contract of sale of September 20, 1906, described a residence or mansion known as the "J. Dalzell Brown mansion," and did expend considerable moneys for materials and labor thereon.

III.

That at some time prior to the said 30th day of October, 1907, said J. Dalzell Brown became insolvent and unable to pay his debts; and on or about said 30th day of October, 1907, said J. Dalzell Brown was indebted to divers persons for labor and material used, employed and expended in the erection of said J. Dalzell Brown mansion, at the instance and request of said J. Dalzell Brown in the sum, in the aggregate of more than fifteen thousand dollars ($15,000), for which said indebtedness said persons to whom the said J. Dalzell Brown was indebted [44] claimed liens against the property of the defendant hereinabove described under and by virtue of the provisions of Chapter II, Title IV, Part Three, of the Code of Civil Procedure of the State of California, and that said indebtedness did constitute a lien upon said property in the sum of said fifteen thousand dollars ($15,000).

IV.

That thereafter and prior to on or about the first day of April, 1908, notice of claim of liens for said fifteen thousand dollars ($15,000) were filed by the said persons to whom the said J. Dalzell Brown was indebted as aforesaid, in the office of the County Recorder of the county of Lake, State of California, all in accordance with the provisions of said Chap-

ter II, Title IV, Part Three, of the Code of Civil Procedure of the State of California, and that upon the filing of said notice of lien said real property of this defendant became and was charged with liens in favor of said creditors of said J. Dalzell Brown in the sum of fifteen thousand dollars ($15,000). That said J. Dalzell Brown failed and neglected and refused to pay or discharge said indebtedness or to remove said liens or any part thereof, and that this defendant, in order to prevent and save his said property described in said sales contract from being sold by order of Court to satisfy said liens, was compelled to pay and did pay, on or about the first day of May, 1908, the amount of said indebtedness and liens in the sum of fifteen thousand dollars ($15,000) as aforesaid, by reason whereof this defendant was damaged by the said J. Dalzell Brown in the sum of said fifteen thousand dollars ($15,000), and is entitled to assert herein a defense and offset of the said claim and demand of the defendant in the said sum of fifteen thousand dollars ($15,000), together with interest thereon at the rate of seven per cent per annum from the 1st day of May, 1908. [45]

V.

That the incurring of said indebtedness by the said J. Dalzell Brown and the attaching of said liens by reason of said indebtedness upon the lands of this defendant was wholly without the consent and against the will of this defendant.

WHEREFORE, defendant prays judgment that the plaintiff take nothing by this action, and that the defendant have judgment herein for his costs

and disbursements to be taxed.

LUTHER ELKINS,
C. A. S. FROST,
Attorneys for Defendant.
HERBERT V. KEELING,
Of Counsel.

State of California,
County of Lake,—ss.

Heinz Springe, being first duly sworn, deposes and says: That he is the defendant named in the above-entitled action; that he has read the foregoing answer to amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

HEINZ SPRINGE.

Subscribed and sworn to before me, this 23d day of March, 1915.

[Seal] H. V. KEELING,
Notary Public in and for the County of Lake, State of California. [46]

Exhibit "A" to Answer to Amended Complaint.

In the Superior Court of the State of California, in and for the County of Lake.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS, and ALFRED WHITE (Hereby Sued by Fictitious Names),

Defendants.

Complaint in Ejectment.

Plaintiff complains of defendants, and each of them, and alleges:

I.

That, on the 30th day of October, 1907, the plaintiff was and ever since has been, and now is, the owner and seized in fee of the following described real property, and the whole thereof, to wit:

All that certain tract of land, situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit:

The Northeast quarter (NE. ¼); the Southeast quarter (SE. ¼); the Southeast quarter of the Northwest quarter (SE. ¼of NW. ¼) and the Northeast quarter of the Southwest quarter (NE. ¼ of SW. ¼) of Section Twenty-one (21); the South half (S.½) of Section Twenty-two (22); and Southwest quarter of the Southwest quarter (SW. ¼ of SW. ¼) of Section

Twenty-three (23); the Northwest quarter (NW. ¼); the Southwest quarter of the North east quarter (SW. ¼ of NE. ¼), and the fractional North half (N.½) of the Southwest quarter (SW. ¼) of Section Twenty-six (26); the fractional North half (N. ½) of Section Twenty-seven (27); the fractional North half (N. ½) of Section Twenty-eight (28); and the fractional East half (E. ½) of Section Twenty-nine (29); lying east of slough; all in Township Fifteen (15) North, Range Nine (9) West, Mount Diablo Base and Meridian;

Excepting, however, the following described portion of Section Twenty-six (26) in said Township Fifteen (15) North, Range Nine (9) West, to wit:

The Southwest quarter of the Northeast quarter (SW. ¼ of NE. ¼), the East half of the Northwest quarter (E. ½ of NW. ¼), Lot two (2), the East half of the Southwest quarter (E. ½ of SW. ¼) of Northwest quarter (NW. ¼), and also part of Lot One (1), commencing at the Northeast corner thereof, running thence West ten (10) chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of said Lot One (1), and thence North to place of beginning. [47]

Also that certain tract of land situate in the County of Lake, State of California, and being Lots Three (3), Four (4), Nine (9) and Twelve (12) of Section Six (6), Township Fifteen (15)

North, Range Eight (8) West, M. D. M., containing about One Hundred seventy-eight (178) acres of land.

—and was, on said 30th day of October, 1907, in possession of said real property hereinabove described, and of the whole thereof; and on said date, and while the plaintiff was so the owner and in possession of said real property, the said defendants, and each of them, entered into said premises and ousted plaintiff therefrom.

That plaintiff on said 30th day of October, 1907, was, and ever since said date has been, lawfully entitled to the possession of said real property, and of the whole thereof, but that defendants, and each of them, have ever since said date unlawfully withheld from plaintiff the possession thereof, and of the whole thereof, to plaintiff's damage in the sum of five thousand dollars ($5,000).

II.

That the value of the use and occupation of said real property and premises since said 30th day of October, 1907, and while plaintiff has been excluded therefrom by said defendants, is and will hereafter be the sum of four hundred dollars ($400) per month.

III.

That the true names of said defendants sued herein by the fictitious names of John Doe Simmons and Alfred White, are unknown to this plaintiff, and plaintiff requests that he may be permitted to insert the true names of said defendants so sued by fictitious names as soon as he shall be informed of their true names.

WHEREFORE, plaintiff demands judgment against said defendants and each of them for the possession of said real property and premises hereinabove described; for five thousand dollars [48] ($5,000) plaintiff's damages by the withholding of the same; and said further sum of Four Hundred dollars ($400) per month for each month from the said 30th day of October, 1907, until the delivery of said real property and premises, same being the value of the use and occupation thereof; and for plaintiff's costs of suit.

GALPIN, ELKINS & FROST,
Attorneys for Plaintiff.

State of California,
County of Lake,—ss.

Heinz Springe, being first duly sworn, says: That he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

HEINZ SPRINGE.

Subscribed and sworn to before me this 16th day of January, 1908.

[Seal] H. V. KEELING,
Notary Public in and for the County of Lake, State of California.

[Endorsed]: Filed Jan. 16th, 1908. Shafter Mathews, Clerk. [49]

Exhibit "B" to Answer to Amended Complaint.

In the Superior Court of the State of California, in and for the County of Lake.

No. 1789.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS and ALFRED WHITE (Hereby Sued by Fictitious Names),

Defendants.

Answer of Defendant Brown.

Now comes J. Dalzell Brown, and for answer to the complaint herein denies and alleges as follows:

I.

Defendant denies that plaintiff was on the 30th day of October, 1907, or at any time since has been, or now is, the owner and seized in fee or seized in fee of the real property the whole thereof or any part thereof, described in said complaint.

Defendant further denies that plaintiff was on said 30th day of October, or at any time since the 15th day of December, 1906, has been, in possession of said property; and denies that on said date, or at any other time, defendant entered into said property and ousted plaintiff therefrom.

Defendant further denies that plaintiff was on said 30th day of October, 1907, or at any time since the 15th day of December, 1906, has been, or now is, law-

fully or otherwise entitled to the possession of said real property, or any part thereof; and while admitting that defendants have withheld from plaintiff the possession of said property, denies that such withholding was or is unlawful, and that plaintiff suffered damage thereby in the sum of $5,000 or any other sum, or at all. [50]

Defendant further denies that the value of the use and occupation of said real property while plaintiff has been excluded therefrom by defendants is or was the sum of $400 per month, or any other sum whatever.

II.

But defendant, as and for his affirmative defense, alleges as follows:

That on the 20th day of September, 1906, plaintiff entered into a contract with one L. J. Shuman (a full and *correct of* which contract is hereunto attached and made a part hereof and labeled Exhibit "A") for the sale of the property described in the complaint herein.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to defendant, J. Dalzell Brown, by an instrument in writing (a full and correct copy of which instrument is hereunto attached and made a part hereof and labeled Exhibit "B") all his right, title and interst in said contract.

That on the 20th day of September, 1907, defendant J. Dalzell Brown entered into, with Central Counties Land Company, a corporation, organized and existing and doing business under the laws of

the State of California, a contract (a full and correct copy of which contract is hereunto attached and made a part hereof and labeled Exhibit "C"), for the sale of 1,700 acres of the above-mentioned property.

That on the 14th day of December, 1907, defendant, J. Dalzell Brown, entered into, with said Central Counties Land Company, a contract (a full and correct copy of which contract is hereunto attached and made a part hereof and labeled Exhibit "D"), for the sale of the balance of the above-mentioned property as described in said complaint. [51]

That on the 15th day of December, 1906, plaintiff let defendant J. Dalzell Brown into possession of the whole of said property and defendant J. Dalzell Brown, under *and virtue* of said contract labeled herein Exhibit "A," entered into and ever since has been until February 1st, 1908, in complete and undisturbed possession of said property.

That on the first day of February, 1908, defendant J. Dalzell Brown let said Central Counties Land Company into complete possession of said property, and said Central Counties Land Company ever since said date has been, and now is in the full possession of the whole of said real property and is holding the same and claims the right to hold the same, by virtue of the above-mentioned contracts.

That since entering into possession of said property defendant has erected extensive improvements thereon, of the reasonable value of $40,000.

That defendant has paid plaintiff all the installments of the purchase price of said property and the

interest thereon as provided for in said contract entitled Exhibit "A," except the last installment thereof, to wit, $28,500, and interest thereon at the rate of 6½% per annum from June 15th, 1907; and said last installment and interest are now due and payable to plaintiff.

That on the 18th day of December, 1907, plaintiff tendered to defendant a document purporting to be a deed conveying said property to defendant, and at the same time demanded the above-mentioned sum of $28,500, and interest. That said 18th day of December, 1908, was a legal holiday. And that no further tender of a deed conveying title to the said property has been made by plaintiff to defendant; and defendant is informed and believes and on that ground alleges that no such tender has been made to any one else. [52]

That said Central Counties Land Company did on the 26th day of December, 1907, file in this court, in and for the city and county of San Francisco, an action in equity numbered 13,476, against Heinz Springe, plaintiff herein, and J. Dalzell Brown, defendant herein, for the determination of its right to hold said property, as aforesaid, and for judgment decreeing the conveyance to itself of said property, (a full and correct copy of the complaint in which action is hereunto annexed and made a part hereof and labeled Exhibit "E"); and said action is still pending and undetermined. And defendant is informed and believes and on the ground alleges that said Central Counties Land Company offered in its said complaint in said action and does still offer to

perform the covenants and conditions on its part and on the part of its assignors and of defendant, in the above-mentioned contracts, but that plaintiff has neglected and refused, and does still neglect and refuse to accept and comply with said offer and to perform the covenants and conditions on his part in said contract herein entitled Exhibit "A."

III.

Defendant further avers that said Central Counties Land Company is a necessary party to this action; and a complete determination of the controversy herein cannot be had without bringing in said Central Counties Land Company.

IV.

Defendant, as and for a further and separate cause of action, and in abatement of this action, avers as follows:

That said Central Counties Land Company did on the 26th day of December, 1907, file in this court in and for the city and county of San Francisco, an action in equity, numbered 13,476, against Heinz Springe, plaintiff herein, and J. Dalzell Brown, a defendant herein, for the determination of its right to hold the above-mentioned real property and for a decree ordering the [53] conveyance to itself of said property (a full and correct copy of the complaint in which action is hereunto annexed and made a part hereof labeled Exhibit "E"); that plaintiff has been served with summons and a copy of the complaint in said action, and said action is still pending and undetermined. And defendant is informed and believes and on that ground alleges that a determina-

tion of said action will more fully determine the same cause of action and the same rights of the parties hereto as are the subject of the action herein.

WHEREFORE defendant prays this Honorable Court to bring in as a party said Central Counties Land Company; to abate this action; to dismiss defendant with his costs; and for such other further judgment as shall be meet and proper in the premises.

EDWARD O. ALLEN,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

J. Dalzell Brown, being first duly sworn, deposes and says; that he is a defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated as on information and belief, and that as to those matters he believes it to be true.

J. DALZELL BROWN.

Subscribed and sworn to before me this 10th day of March, 1908.

[Seal] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California. [54]

Exhibit "A" to Answer of Defendant Brown.

Lakeport, Cal., September 20, 1906.

In consideration of Thirty Five Hundred ($3500) Dollars the receipt of which is hereby acknowledged, as payment on account of the purchase price herein provided for HEINZ SPRINGE of the County of

Lake, State of California; hereinafter designated as the Seller, promises and agrees to sell to L. J. Shuman, or his assignee, hereinafter designated as the PURCHASER, for the sum of Fifty-Five Thousand ($55,000) Dollars, upon the terms and conditions herein mentioned all the personal property described in Schedule "A" hereunto attached and hereby referred to and made a part hereof, and all that certain tract of land situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit:

The Northeast quarter; the Southeast quarter; the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 21; the South half of Section 22; the Southwest quarter of the Southwest quarter of Section 23; the Northwest quarter; the Southwest quarter of the Northeast quarter and the fractional North half of the Southwest quarter of Section 23; the fractional North half of Section 27; the fractional North half of Section 28; and the fractional East half of Section 29, lying East of slough; all in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said Township 15 North, Range 9 West, to wit:

The Southwest quarter of Northeast quarter, the East half of Northwest quarter, Lot 2, the East half of the Southwest quarter of Northeast quarter, and also a part of Lot 1, Commencing at the Northeast corner thereof, running thence West 10 chains, thence

South to the meander line of Clear Lake, thence [55] Southeasterly along said meander line to the Southeast corner of said Lot 1, and thence North to the place of beginning.

Also that certain tract of land situate in the County of Lake, State of California, and being Lots 3, 4, 9 and 12 of Section 6, Township 15 North, Range 8 West, M. D. M., containing about One Hundred and Seventy-eight (178) acres of land.

It being expressly understood that the Northeast quarter of Northeast quarter of said Section 21, Township 15 North, Range 9 West, M. D. M., containing 40 acres of land, and embraced in the above description, is unpatented land, but has been paid for to the State of California, in full, and that patent will be secured as soon as possible.

The Seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said Abstract within which to examine title. Objections to the title, if any, shall be reported to the Seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The Seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent), are not removed within a reasonable time, not to exceed ninety days, after the receipt by the seller of said written report the Purchaser at his option may insist upon the specific performance of the

Seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the Seller agrees to return to him the sums of money herein receipted for and any further sums paid on account of said purchase price. But if the sale herein provided for is not consummated under the terms and conditions of the agreement, by reason of the failure of the Purchaser to **[56]** pay the balance of the purchase price when due as herein provided, then the sums of money paid the Seller on account of the purchase price and interest thereon shall be forfeited and retained by the Seller as liquidated damages, and the Seller shall be thereafter released from all further obligation in law and equity, to convey said lands, and may, at once, take possession thereof and re-enter the same.

The balance of the purchase price, the sum of Fifty-one Thousand Five Hundred ($51,500) Dollars shall be paid as follows:

I. The sum of Thirteen Thousand ($13,000) Dollars shall be paid on the 15th day of December, 1906. It is *understand* and agreed that this payment includes a payment of Five Thousand ($5,000) Dollars on account of the Purchase price of the land above described, and Eight Thousand ($8,000) Dollars as the purchase price of the stock and other personal property herein agreed to be sold.

II. The further sum of Five Thousand ($5,000) Dollars shall be paid on the 15th day of March, 1907.

III. The further sum of Five Thousand ($5,000) Dollars shall be paid on the 15th day of June, 1907.

IV. A final payment of Twenty-eight Thousand

Five Hundred ($28,500) Dollars shall be paid on September 15th, 1907.

The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above-described parcels of land and payment of said last installment of Twenty-eight Thousand Five Hundred ($28,500) Dollars of the purchase price are concurrent conditions.

It is understood and agreed that all deferred payments shall bear interest from date until time of payment at the rate of six and one-half (6½%) per cent per annum and that said interest shall be paid quarterly, commencing with the 15th day of December, 1906, and which said interest payments are as follows, to wit: [57]

The sum of Seven Hundred Ninety and 40/100 ($790.40) Dollars on December 15th, 1906.

The sum of Six Hundred Twenty-five and 62/100 ($625.62) Dollars on March 15th, 1907.

The sum of Five Hundred Forty-four and 57/100 ($544.57) Dollars on June 15th, 1907; and

The sum of Four Hundred Sixty-three 12/100 ($463.12) Dollars on September 15th, 1907.

It is understood and agreed that the Seller shall deliver possession of all the property herein agreed to be sold at the time of making the payment of Thirteen Thousand ($13,000) Dollars on December 15th, 1906, but any loss or damage thereto after the date hereof, shall be at the risk of the purchaser. None of the said property hereafter shall be removed from said premises by said Seller, but he shall be permitted to use all necessary firewood for his own domestic

purposes, and shall also, have the right to the milk from the cows now being milked on said Ranch, up to the 15th day of December, 1906.

The Purchaser agrees to pay the salary of the present foreman of said Carson Rancho (or should he leave such other foreman as may be selected by the Seller) the sum of Sixty ($60) Dollars per month, from the date of this agreement until said 15th day of December, 1906.

It is agreed between the parties hereto that taxes for the present fiscal year commencing on the first day of July, 1906, shall be prorated between the parties hereto in proportion to the length of their several possessions of the land, that is to say, the Seller agrees to pay his *pro rata* of said taxes computed from the First Monday of March, 1906, up to the 15th day of September, 1906, and the Purchaser agrees to pay all the taxes after that date.

It is also understood and agreed that the Purchaser shall [58] hereafter bear the cost of necessary repairs, and of such improvements as to which he may consent.

The Seller agrees to pay portions of the property herein agreed to be sold to such persons as may be named by the Purchaser upon payment to the Seller of One Hundred and Fifty ($150) Dollars per acre, if the tract so to be conveyed is situate in either of Sections 27, 28 or 29 and that part of Section 26 as hereinafter provided, or if the tract so to be conveyed is situate elsewhere, upon the payment of Ten ($10) Dollars per acre; but it is expressly provided that the tracts of land so to be conveyed shall contain

at least One Hundred (100) acres each and that tracts shall only be sold and conveyed, in the following manner and parcels, to wit:

The First tract to be sold shall be as follows, to wit:

The South Half of Northwest quarter of Northwest Quarter; the West half of Southwest quarter of Northeast quarter of Section 26 also beginning at the North West corner of Lot One (1) of said Section 26, and running thence East Ten Chains, thence South to the meander line of Clear Lake, thence Northwesterly along said meander line to the South West corner of said Lot One (1), and thence North to beginning; Lot Four (4); and the South half of Northeast quarter of Northeast quarter of Section 27;

All being in Township Fifteen (15) North Range Nine (9) West, M. D. M. containing in all 106 acres, more or less.

THEREAFTER no tract or tracts shall be sold and conveyed in said Sections 27, 28 and 29, unless it be contiguous and adjoin to a tract of land already conveyed, and *much* contain at least 100 acres in each tract, and must be in compact parcels of even width and running back from the meander line of Clear Lake to the North line of said Sections 27, 28 and 29; that is to say, it is intended, that all of the lands situate in said Section 27 contiguous to said last above described tract and running to the [59] North line of said Section 27, shall next be sold before any other lands.

It is also agreed between the parties hereto that the Purchaser may take any payments or any portion of

any payments before they become due under the terms of this agreement; and that all payments made under the terms of this Contract are to be considered as being made on account of the payment then due, or if no payment is then due, on account of the payment next becoming due under the terms of this agreement; but it is expressly understood that the interest installments shall be paid in full as hereinbefore provided and that any payments made before *the* become due shall not affect or reduce said interest.

It is understood and agreed by and between the parties to this agreement that it is the intention of the Seller to sell and of the Purchaser to buy all of the real property and property rights of every kind and nature whatsoever owned by the Seller and situate in the County of Lake, State of California, excepting only the lands heretofore described as being excepted from the Carson Rancho and situate in said Section 26; and it is agreed that any real properties situate in the County of Lake owned by the seller shall be deemed to be and be covered by this agreement though said real properties are not specifically described herein.

Time is made the essence of these agreements.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 20th day of September, 1906.

Executed in triplicate.

HEINZ SPRINGE. (Seal)

L. J. SHUMAN. (Seal)

SCHEDULE "A."

All of the horses, cattle, hogs, farming implements, now situate and contained on the premises herein described, saving and excepting one horse Mont Bello. [60]

Exhibit "B" to Answer of Defendant Brown.

KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the sum of Ten Dollars in United States Gold Coin to him in hand paid, by J. DALZELL BROWN, receipt whereof is hereby acknowledged, L. J. SHUMAN does hereby assign, transfer and convey unto said J. DALZELL BROWN, ALL HIS RIGHT, TITLE AND INTEREST IN AND TO that certain contract and agreement entered into on the 20th day of September, 1906, between said SHUMAN and H. SPRINGE, which contract and agreement is hereto attached and made part hereof, and which said agreement relates to and affects certain property situate in the County of Lake, State of California, and more particularly described in said Contract.

IN WITNESS WHEREOF, said L. J. SHUMAN has hereunto set his hand and seal, this 20th day of September, 1906.

L. J. SHUMAN.

Exhibit "C" to Answer of Defendant Brown.

OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars ($1000) to me paid, the receipt whereof is hereby acknowledged, I, *L.* DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND

COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Seven Thousand ($67,000) Dollars all that property, containing seventeen hundred (1700) acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M. lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN on the part of HEINZE SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be [61] made as follows, to wit, namely the sum of Thirty Thousand Dollars ($30,000) in United States Gold Coin, and the balance of Thirty Seven Thousand Dollars ($37,000) in authorized debenture certificates of said Central Counties Land Company at par value to wit, $500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain, and sale deed conveying a good title to the above-described property, free and clear of all liens and incumbrances.

San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown:

EDWARD O. ALLEN.

Exhibit "D" to Answer of Defendant Brown.

OPTION.

In consideration of the sum of One Thousand ($1000) Dollars, to me paid, the receipt whereof is

hereby acknowledged, I, J. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or to its assigns, the right or option, to purchase within six months from the date hereof for the additional sum of Sixty Four Thousand ($64,000) Dollars, the remaining part of my property, containing Two Hundred and Fifty (250) acres, more or less, on Clear Lake, California, (sold to me by Heinz Springe under that certain contract dated September 20th, 1906, between said Springe and L. J. Shuman), not otherwise agreed to be sold to Central Counties Land Company under that certain option and agreement, dated September 20th, 1907, for [62] the sale of 1700 acres of said property; payment of said amount of $64,000 to be made as follows, to wit: namely: Said Central Counties Land Company shall assume the satisfaction of all liens levied against said property in relation to the construction of certain improvements thereon; said company shall also within six months from date pay to me the sum of Twenty Thousand ($20,000) Dollars in U. S. Gold Coin and at the same time shall execute and deliver a mortgage on said 250 acres and improvements covering the balance of said $64,000 payable in two years and bearing interest at the rate of 6% net. Upon the payment of said amounts and the delivery of said mortgage within the period stated, and concurrently conditional therewith, I agree to deliver to the nominee of said Company a sufficient grant, bargain and sale deed, covering a good title to the above-described property, free and clear of all liens and incumbrances.

San Francisco, Cal., December 14th, 1907.

J. DALZELL BROWN.

Witness to signature of J. Dalzell Brown:

EDWARD O. ALLEN. [63]

Exhibit "E" to Answer of Defendant Brown.

In the Superior Court in and for the City and County of San Francisco, State of California.

CENTRAL COUNTIES LAND COMPANY (a Corporation),

Plaintiff,

vs.

J. DALZELL BROWN and HEINZ SPRINGE,

Defendants.

Complaint in Equity.

Plaintiff, for cause of action, alleges as follows:

I.

That plaintiff is a corporation organized and acting under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in said State.

II.

That on the 20th day of September, 1906, defendant Springe entered into a contract with one L. J. Shuman (a full and correct copy of which contract is hereto attached and made a part hereof and labelled Exhibit "A") for the sale of that certain property situate in the county of Lake, State of California and described as follows, to wit:

The Northeast quarter; the Southeast quarter; the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of

Section 21; the South half of Section 22; the Southwest quarter of the Southwest quarter of Section 23; the Northwest quarter; the Southwest quarter of the Northeast quarter and the fractional North half of the Southwest quarter of Section 26; the fractional North half of Section 27; the fractional North half of Section 28; and the fractional East half of Section 29; lying east of slough, all in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said Township 15 North, Range 9 West, to wit:

The Southwest quarter of Northeast quarter, the East half of Northwest quarter, Lot 2, the East half of the Southwest quarter of Northwest quarter, and also a part of Lot 1, commencing at the Northeast corner thereof, running thence West 10 chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of said Lot 1, and thence North to the place of beginning.

Also that certain tract of land situate in the County of [64] Lake, State of California, and being Lots 3, 4, 9, and 12 of Section 6, Township 15 North, Range 8 West, M. D. M. containing about One Hundred and Seventy Eight (178) acres of land.

III.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to defendant, Brown, by an instrument in writing (a full and correct copy of which instrument is hereto

attached and made part hereof and labeled Exhibit "B") all his right, title and interest in and to the above-mentioned contract.

IV.

That defendant Brown has paid the defendant Springe, all the installments on the purchase price of said property and the interest thereof as provided for in said contract, except the last installment thereof, to wit, the sum of $28,500 and interest thereon at the rate of 6% per annum from June 15th, 1907; and that there is now due and owing to defendant, Springe, by defendant Brown, said sum of $28,500 and interest as aforesaid.

V.

That defendant Brown entered into possession of said property under the terms of said contract on December 15, 1906, ever since has been and now is in possession thereof; and since that date has erected extensive improvements thereon, consisting of a villa surrounded by gardens and other buildings, all of the *reasonable of* $40,000.

VI.

That on the 18th day of December, 1907, defendant Heinz Springe, by his attorney, Eugene W. Levy, at the city and county of San Francisco, tendered to the defendant J. Dalzell Brown, a document purporting to be a deed of said property to said *L.* Dalzell Brown, and at the same time demanded from said Brown the above-mentioned sum of $28,500 and interest.

That said 18th day of December, 1907, was a legal holiday duly declared such by the Governor of the State of California.

That no further tender of a deed conveying title to the [65] above-described property has been made to defendant, Brown, by defendant, Springe, subsequent to said 18th day of December, 1907.

VII.

That on the 20th day of September, 1907, defendant, J. Dalzell Brown, entered into a contract with plaintiff (a full and *correct of* which contract is hereto attached, made a part hereof, and labelled Exhibit "C") for the sale of 1700 acres of the above-mentioned property.

VIII.

That on the 14th day of December, 1907, the defendant, *L.* Dalzell Brown, entered into a contract with plaintiff (a full and correct copy of which contract is hereby attached and made a part hereof and labelled Exhibit "D") for the sale of the balance of the above-mentioned property, containing about 250 acres.

IX.

That on the 23d day of December, 1907, plaintiff tendered to defendant, Brown, in the city and county of San Francisco, State of California, by its secretary, Edward O. Allen, thereunto duly authorized, a written offer of performance of the above-mentioned contracts of September 20, 1907, and December 14, 1907, respectively.

That then and there defendant, Brown, stated that he could not deliver to plaintiff a deed conveying a good title to the above-described property for the reason that he had not yet received a conveyance of said property from defendant, Springe.

Plaintiff furthermore is informed and believes and on that ground alleges that defendant Brown has not received a conveyance of the said property from defendant, Springe, for the reason that defendant, Brown, does not possess sufficient funds to pay the amount due said Springe under the first above-mentioned contract of sale. [66]

X.

That plaintiff is now ready and willing to perform its obligations under said contracts of September 20, 1907, and December 14th, 1907, with defendant Brown, to wit—to pay the sum of thirty thousand dollars ($30,000) in United States gold coin and to deliver authorized debenture certificates of the Central Counties Land Company of the aggregate par value of $37,000 on the former contract; to pay the sum of $20,000 in United States gold coin; to execute and deliver a mortgage on 250 acres above mentioned and to assume the satisfaction of all liens and claims against said property in relation to the construction of certain improvements thereon, as provided for in the latter agreement. But the defendant *L.* Dalzell Brown, is unable to deliver a sufficient grant, bargain and sale deed, conveying a good title to the above-described property, free and clear of all liens and incumbrances, by reason of the fact that defendant, Springe, refuses to convey to said Brown the first above-described property.

WHEREFORE, plaintiff prays this Honorable Court to render its judgment ordering, adjudging and decreeing that plaintiff be substituted to all the interests of the defendant, J. Dalzell Brown, in and

to the property and contract first above mentioned;

Also ordering, adjudging and decreeing that defendant, Heinz Springe, convey said property to plaintiff, upon plaintiff rendering to said Heinz Springe the sum of twenty eight thousand five hundred ($28,500) dollars and interest at the rate of 6½% per annum from June 15, 1907, and also upon plaintiff paying to J. Dalzell Brown the sum of fifty thousand ($50,000) dollars in United States gold coin less said $28,500 and interest, also the debenture certificates of plaintiff of the aggregate par value of $37,000, assuming the satisfaction of all liens and claims against said property in relation to the construction [67] of certain improvements thereon and executing and delivering a mortgage on the above-mentioned 250 acres covering the balance due under the above-mentioned contracts of September 20, 1907, and December 14, 1907.

And for such other and further judgment as shall be meet and proper in the premises.

(Signed) EDWARD O. ALLEN,
Attorney for Plaintiff, Central Counties Land Co.

State of California,
City and County of San Francisco,—ss.

Edward O. Allen, being first duly sworn, deposes and says: That he is the Secretary of the Central Counties Land Company, a corporation, plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief and that as to those matters he believes it to be true.

(Signed) EDWARD O. ALLEN.

Subscribed and sworn to before me this 26th day of December, 1907.

[Seal] J. J. KERRIGAN,
Notary.

Exhibits "A," "B," "C" and "D" and part of this Exhibit "E" as originally filed, are the same as the foregoing Exhibits "A," "B," "C," and "D," respectively, attached to this Complaint.

[Endorsed]: By the Court. Ordered filed as Answer of Defendant, J. Dalzell Brown. Filed April 27th, 1908. Shafter Mathews, Clerk. [68]

Exhibit 3—Complaint in Intervention.

In the Superior Court of the State of California, in and for the County of Lake.

No. 1879.

HEINZ SPRINGE,
Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS and ALFRED WHITE (Hereby Sued by Fictitious Names),
Defendants.

Complaint in Intervention.

Now comes the Central Counties Land Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco in said State, and intervening in the above-entitled proceeding for its interest in, and to protect its ownership of and title to

the parcels of land described in the complaint of above-named plaintiff, on file in the above-entitled action, said Central Counties Land Company shows and alleges as follows:

I.

That on the 20th day of September, 1906, plaintiff entered into a contract with one L. J. Shuman (a full, true and correct copy of which contract is attached to and made a part of the answer of defendants, J. Dalzell Brown and defendants Symons on file in the above-entitled action and labeled Exhibit "A," which Exhibit "A" is hereby referred to and made a part hereof) for the sale to said Shuman of the property described in the complaint herein.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to J. Dalzell Brown, by an instrument in writing (a full, true and correct copy of which instrument is attached to and made a part of the Answers [69] of defendants J. Dalzell Brown and defendants Symons, on file in the above-entitled action and labeled Exhibit "B," which Exhibit "B" is hereby referred to and made a part hereof), all his right, title and interest in and to said contract.

That on the 20th day of September, 1907, said J. Dalzell Brown entered into, with Central Counties Land Company, a corporation and intervenor herein, a contract (a full, true and correct copy of which contract is attached to and made a part of the answers of defendant J. Dalzell Brown and defendant Symons on file in the above-entitled action and labeled Exhibit "C," which Exhibit "C" is hereby re-

ferred to and made a part hereof) for sale of 1700 acres of the above-mentioned property.

That on the 14th day of December, 1907, defendant J. Dalzell Brown entered into, with said Central Counties Land Company, a corporation, and intervenor herein, a contract (a full, true and correct copy of which contract is attached to and made a part of the answers of defendant J. Dalzell Brown and defendant Symons on file in the above-entitled action and labeled Exhibit "D," which Exhibit "D" is hereby referred to and made a part hereof), for the sale of the balance of the above-mentioned property as described in plaintiff's complaint in the above-entitled action.

That on the 15th day of December, 1906, plaintiff let defendant J. Dalzell Brown into possession of the whole of said property and defendant J. Dalzell Brown, under and by virtue of said contract herein referred to as Exhibit "A," entered into and thereafter until February 1st, 1908, remained in complete and undisturbed possession of said property.

That on the 1st day of February, 1908, defendant J. Dalzell Brown let said Central Counties Land Company, a corporation and intervenor herein, into complete possession of said property, and said Central Counties Land Company ever since said date has been, and now is holding the same and claims the right to hold the same under and by virtue of the above-mentioned contracts, [70] and that said Central Counties Land Company holds possession of said property through its servants or employee, defendant Symons.

II.

Central Counties Land Company further avers and shows that Messrs. Albert B. Southard and John A. Black are necessary parties to this above-entitled action, and that a complete determination of the controversy in said action cannot be had without bringing in said Albert B. Southard and John A. Black; and said Central Counties Land Company further petitions this Court and asks that said Albert B. Southard and John A. Black be brought into the above-entitled actions as parties defendant and to that end Central Counties Land Company shows and alleges:

That Central Counties Land Company is informed and believes and therefore alleges the fact to be: That on the day of ———, 1908, said Albert B. Southard and John A. Black obtained a judgment against J. Dalzell Brown in the Superior Court of the State of California in and for the city and county of San Francisco for the sum of $3709.05. That thereupon a writ of execution was issued to the sheriff of the county of Lake, State of California and said sheriff levied upon the property described in plaintiff's complaint on file in the above-entitled action and upon an execution sale by said sheriff, duly had according to law, said property was on the 7th day of February, 1908, sold to Messrs. Albert B. Southard and John A. Black and that thereafter a Certificate of Sale of Real Estate on Execution was duly issued to said Albert B. Southard and John A. Black, which said Certificate of Sale of Real Estate on Execution is still in full force and effect and is

still held by Albert B. Southard and John A. Black.

WHEREFORE, said Central Counties Land Company prays that an order be made by this Court to the effect that the summons and the complaint in the above-entitled action be amended by the addition of Central Counties Land Company, a Corporation, [71] and Albert B. Southard and John A. Black as defendants therein; and that plaintiff cause the said Central Counties Land Company and the said Albert B. Southard and John A. Black to be each duly served with a copy of the said amended summons and amended complaint and that said Central Counties Land Company and Albert B. Southard and John A. Black be allowed to plead to the complaint on file in the above-entitled action.

EDWARD O. ALLEN,
Attorney for Central Counties Land Co.

State of California,
City and County of San Francisco,—ss.

Edward O. Allen, being first duly sworn, deposes and says:

That he is the Secretary of the Central Counties Land Company, a corporation, intervenor herein; and that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

EDWARD O. ALLEN.

Subscribed and sworn to before me this 21st day of May, 1908.

[Seal] A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: "Filed May 23, 1908. Shafter Mathews, Clerk. By B. J. Turner, Deputy Clerk." [72]

Exhibit 4—Findings of Fact and Conclusions of Law.

In the Superior Court of the State of California, in and for Lake County.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN,

Defendant,

and

CENTRAL COUNTIES LAND COMPANY,

Intervenor.

Findings of Fact and Conclusions of Law.

This cause coming on regularly to be heard, on the twenty-fifth (25th) day of May, 1908, before the Court, sitting without a jury, a jury having been expressly waived, plaintiff appearing by Luther Elkins, Esq., and C. A. S. Frost, Esq., of the law firm of Galpin, Elkins & Frost, and Herbert V. Keeling, Esq., of counsel; defendant J. Dalzell Brown appearing by Edward O. Allen, Esq., his attorney; and Central Counties Land Company, intervenor herein, ap-

pearing by C. M. Crawford of the firm of Crawford & Crawford, and by J. B. Kennedy, Esq., representing Chas. S. Wheeler, Esq., and Edward O. Allen, Esq.; and said cause having been tried before the court, and the Court having considered the law and evidence, now finds the following facts:

FINDINGS OF FACT.

I.

On the twentieth (20th) day of September, 1906, plaintiff Heinz Springe was, ever since continuously has been, and now is, the owner of and seized in fee of the real property described in paragraph I of plaintiff's complaint on file herein, and the whole thereof. [73]

II.

On the said twentieth (20th) day of September, 1906, while plaintiff was so the owner and seized in fee of the said real property, as in finding I aforesaid, plaintiff made, executed, and delivered to one L. J. Shuman, the agreement in writing mentioned in paragraph II of the answer of defendant J. Dalzell Brown, on file herein, and marked Exhibit "A" annexed to this answer.

III.

Thereafter, and on the said twentieth day of September, 1906, said L. J. Shuman made, executed and delivered to said defendant, J. Dalzell Brown, the contract in writing, mentioned in paragraph II of the answer of said defendant, Brown, on file herein, and marked Exhibit "B" annexed to said answer.

IV.

Thereafter, and on the fourteenth (14th) day of December, 1907, said J. Dalzell Brown, delivered to said Central Counties Land Company, intervenor herein, two contracts in writing, executed by him, one dated September 20th, 1907, being the contract referred to in paragraph II of defendant J. Dalzell Brown's answer herein, and marked Exhibit "C" annexed to said answer, and another, dated on said 14th day of December, 1907, also referr*ing* to in said paragraph II of said answer of said defendant Brown, and marked Exhibit "D" annexed to said answer.

V.

From the 15th day of December, 1906, to and until the first (1st) day of February, 1908, said defendant, J. Dalzell Brown, was continuously in possession of the real property mentioned in finding I hereof, claiming to hold the same under and by virtue of said Shuman contract, dated September 20th, 1906.

VI.

On said first (1st) day of February, 1908, said defendant, [74] J. Dalzell Brown, surrendered possession of said real property, mentioned in finding I hereof, to said Central Counties Land Company, intervenor herein, and said Central Counties Land Company took possession of said real property on said first day of February, 1908, and ever since has been, and still is, in possession of said real property, claiming to hold the same under and by virtue of the said Shuman contract, dated September 20, 1906, said assignment thereof, dated September 20th, 1906,

from said Shuman to said J. Dalzell Brown, and said writings, dated September 20th, 1907, and December 14th, 1907, respectively, mentioned in finding IV hereof.

VII.

Neither said J. Dalzell Brown nor said Central Counties Land Company ever paid or offered to pay, or tendered, to said plaintiff, Heinz Springe, or to anyone for him, the last installment, due September 15, 1907, under the terms of said Shuman contract of September 20th, 1906, of the purchase price of the real property mentioned in said Shuman contract and in Finding I hereof, nor any part of said last instalment, but, on the contrary, both said defendant Brown and said Central Counties Land Company, intervenor, have wholly failed, neglected, and refused to pay said last installment or any part thereof.

VIII.

On the twenty-ninth (29th) day of October, 1907, said Heinz Springe, plaintiff, tendered a good and sufficient deed of said real property, mentioned in finding I hereof, and, also, in paragraph I of plaintiff's complaint herein, to said J. Dalzell Brown, and then and there demanded of said defendant, J. Dalzell Brown, the payment of the amount then due said Heinz Springe under the terms of said Shuman contract, dated September 20, 1906, and said defendant Brown then refused and neglected, and has ever since refused and neglected, and still refuses and neglects, to pay said amount, so due under the terms of said [75] Shuman contract, or any part thereof.

IX.

On the seventeenth (17th) day of December, 1907, said Heinz Springe, plaintiff, tendered a good and sufficient deed of said real property, mentioned in finding I hereof, and, also, in paragraph 1 of plaintiff's complaint herein, to said J. Dalzell Brown, and then and there demanded of said defendant, Brown, the payment of the amount then due said Heinz Springe under the terms of said Shuman contract, dated September 20th, 1906, and said defendant, Brown, then refused and neglected, and ever since has refused and neglected, and still refuses and neglects, to pay said amount, so due under the terms of said Shuman contract, or any part thereof.

X.

On the sixteenth (16th) day of January, 1908, and prior to the commencement of this action, said Heinz Springe duly demanded possession of said real property, mentioned in finding I hereof, from said J. Dalzell Brown, but said Brown, being then in possession of said real property, by his agent, refused and neglected to deliver up the possession of said real property, to plaintiff, and ever since has refused, and still refuses to deliver up the possession thereof to plaintiff.

XI.

Thereafter, and on the 16th day of January, 1908, said Heinz Springe commenced this action, and, also, on said last-mentioned day, caused to be filed and recorded in the office of the recorder of Lake County, California, a notice of the pendency of this action,

wherein the said real property, mentioned in finding I hereof, was described.

And from the facts so found, the Court deduces the following: [76]

CONCLUSIONS OF LAW.

1.

That said plaintiff, Heinz Springe, was, on the sixteenth (16th) day of January, 1908, ever since has been, and still is, the owner, and seized in fee, of the real property, and of the whole thereof, described in paragraph I of plaintiff's complaint herein, and mentioned in finding I hereof, and entitled to the possession of said real property, and of the whole thereof.

2.

That said Central Counties Land Company, intervenor herein, is not entitled to the relief prayed for in its complaint in intervention, filed herein, nor to any relief.

Dated Lakeport, California, May 26th, 1908.

M. S. SAYRE,

Judge of the Superior Court.

[Endorsed]: Filed May 26, 1908. Shafter Mathews, Clerk. By B. J. Turner, Deputy Clerk. [77]

Exhibit 5—Judgment.

In the Superior Court of the State of California in and for Lake County.

No. 1879.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN,

Defendant,

and

CENTRAL COUNTIES LAND COMPANY,

Intervenor.

Judgment.

This cause coming on regularly to be heard on the twenty-fifth day of May, 1908, before the Court, sitting without a jury, a jury having been expressly waived, plaintiff appearing by Luther Elkins, Esq., and C. A. S. Frost, Esq., of the law firm of Galpin, Elkins & Frost, and Herbert V. Keeling, Esq., of Counsel; defendant J. Dalzell Brown appearing by Edward O. Allen, Esq., his attorney, and Central Counties Land Company, Intervenor herein, appearing by C. M. Crawford, of the law firm of Crawford & Crawford, and J. B. Kennedy, Esq., for Charles S. Wheeler, Esq., and Edward O. Allen, Esq., and said cause having been tried before the Court, and the Court having considered the law and the evidence, after the submission of said cause for its decision,

findings of fact and conclusions of law, in writing, have been filed herein by the Court.

IT IS ORDERED, ADJUDGED AND DECREED, that on the sixteenth (16th) day of January, 1908, the plaintiff, Heinz Springe, was, ever since has been and now is the owner in fee and entitled to the possession of the following described real property, and of the whole thereof, to wit:

All that certain tract of land, situate, lying and being in the county of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit: [78]

The Northeast quarter (NE. ¼); the Southeast quarter (SE. ¼); the Southeast quarter of the Northwest quarter (SE. ¼ of NW. ¼) and the Northeast quarter of the Southwest quarter (NW. ¼ of SW. ¼) of Section Twenty-one (21); the South half (S. ½) of Section Twenty-two (22); the Southwest quarter of the Southwest quarter (SW. ¼ of SW. ¼) of Section Twenty-three (23); the Northwest quarter (NW. ¼); the Southwest quarter of the Northeast quarter (SW. ¼ of NE. ¼) and the fractional North Half (N. ½) of the Southwest quarter (SW. ¼) of Section Twenty-six (26); the fractional North Half (N. ½) of Section Twenty-seven (27); the fractional North Half (N. ½) of Section Twenty-eight (28); and the fractional East Half (E. ½) of Section Twenty-nine (29); lying East of Slough; all in Township Fifteen (15) North, Range Nine (9) West, Mount Diablo Base and Meridian;

Excepting, however, the following described por-

tion of Section Twenty-six (26) in said township fifteen (15) North Range Nine (9) West, to wit: the Southwest quarter of the Northeast quarter (SW. ¼ of NE. ¼); the East half of Northwest quarter (E. ½ of NW. ¼), Lot Two (2), the East half of the Southwest quarter (E. ½ of SW. ¼) of Northwest quarter (NW. ¼), and also part of Lot One (1) commencing at the Northeast corner thereof, running thence West ten (10) chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of Lot One (1), and thence North to the place of beginning.

Also that certain tract of land situate in the county of Lake, State of California, and being Lots Three (3), Four (4), Nine (9) and Twelve (12) of Section Six (6), Township Fifteen (15) North, Range Eight (8) West, Mount Diablo Base and Meridian, containing about One Hundred Seventy-eight (178) acres of land; [79]

It is further ORDERED, ADJUDGED AND DECREED that plaintiff, Heinz Springe, have and recover of and from the defendant, J. Dalzell Brown, and, also, of and from Central Counties Land Company (a corporation), intervenor herein, the possession of the real property hereinabove described, and of the whole thereof, together with said plaintiff's costs and disbursements, amounting to $———.

Dated May 26th, 1908.

M. S. SAYRE,
Judge of the Superior Court.

[Endorsed]: Filed May 26, 1908. Shafter Mathews, Clerk. By B. J. Turner, Deputy Clerk.

Service of the within answer to amended complaint is hereby admitted this 25th day of March, 1915.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff.

[Endorsed]: No. 15,796. United States District Court, Northern District of California, Second Division. Power and Irrigation Company of Clear Lake, Plaintiff vs. Heinz Springe, Defendant. Answer to Amended Complaint. Filed Mar. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

At a stated term, to wit, the March term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 21st day of June, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,796.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

HEINZ SPRINGE.

Minutes of Court—June 21, 1916—Order on Motion for Nonsuit.

The parties and the jury being present as heretofore, the trial was resumed. E. P. Vandercook was recalled and further testified on behalf of plaintiff and plaintiff introduced in evidence its exhibit marked No. 17 and rested. Defendant moved for a nonsuit on the grounds stated, which was argued and pending arguments the further trial was ordered continued to to-morrow morning at 10 o'clock, and the jury, after being duly admonished by the Court, were excused until that time. [81]

At a stated term, to wit, the March term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 22d day of June, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,796.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

HEINZ SPRINGE.

Minutes of Court—June 22, 1916—Order Granting Motion of Nonsuit.

The parties and the jury being present as hereto-

fore, the trial was resumed by the further arguments of counsel, at the conclusion of which the motion was submitted and being fully considered, it was ordered that said motion be and the same is hereby granted, to which ruling the plaintiff then and there duly excepted. Ordered that judgment be entered accordingly, with costs to the defendant, and that the jury be discharged. [82]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Judgment on Nonsuit.

This cause having come on regularly for trial on the 20th day of June, 1916, being a day in the March 1916, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Charles S. Wheeler, Esq., appearing as attorney for plaintiff and R. P. Henshall and Luther Elkins, Esqrs., appearing as attorneys for the defendant, and the trial having been proceeded with on the 21st and 22d days of June in said year and term and evidence having been introduced on behalf of plaintiff and the attorneys for the de-

fendant having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit, and the Court, after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and the same is hereby entered against said plaintiff herein, that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs in this [83] behalf expended taxed at $114.75.

Judgment entered June 22, 1916.

WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

A True Copy. Attest:
[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed June 22, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [84]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Engrossed Bill of Exceptions of Plaintiff to be Used on Behalf of Plaintiff on Writ of Error to the Circuit Court of Appeals of the United States from the Judgment Entered Herein.

BE IT REMEMBERED, that on the 20th day of June, 1916, this cause came on regularly for trial in its regular order on the calendar, Charles S. Wheeler, Esq., appearing as counsel for the Plaintiff, and R. P. Henshall, Esq., and Luther Elkins, Esq., appearing as counsel for the Defendant; and a jury having been impanelled and sworn, and opening statements by respective counsel for plaintiff and defendant having been made, the following proceedings were had:

The corporate existence of plaintiff was proven by Plaintiff's Exhibit 17, a certified copy of its articles of incorporation, which said exhibit is in words and figures as follows:

Plaintiff's Exhibit 17—Certified Copy of Articles of Incorporation of Power and Irrigation Company of Clear Lake.

"STATE OF ARIZONA,
Office of the
Arizona Corporation Commission. [85]

United States of America,
State of Arizona,—ss.

The Arizona Corporation Commission does hereby certify that the annexed is a true and complete transcript of the

ARTICLES OF INCORPORATION
OF
POWER AND IRRIGATION COMPANY OF CLEAR LAKE

which were filed in the office of said Arizona Corporation Commission on the 8th day of April, A. D. 1913, at 1:30 o'clock P. M., as provided by law.

IN TESTIMONY WHEREOF, The Arizona Corporation Commission, by its Chairman, has hereunto set its hand and affixed its Official Seal. Done at the City of Phoenix, the Capitol, this 8th day of April, A. D. 1913.

ARIZONA CORPORATION COMMISSION,
W. P. GEARY,
Chairman.

[Seal] Attest: CHAS. A. SMITH,
Secretary.

Articles of Incorporation of Power and Irrigation Company of Clear Lake.

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned residents of the City of Phoenix, whose postoffice address is Phoenix, Arizona, have this day associated ourselves together for the purpose of forming a corporation under and pursuant to the laws of the State of Arizona, and for that purpose do hereby adopt Articles of Incorporation as follows:

FIRST. The name of the corporation shall be

POWER AND IRRIGATION COMPANY OF CLEAR LAKE.

The principal place in which the business of said corporation is to be transacted within the State of Arizona is Phoenix, Maricopa County, and the corporation may establish branch offices at London, England; New York in the State of New York; San Francisco in the State of California and elsewhere, where meetings of the stockholders and directors may be held.

SECOND. The general nature of the business proposed to be transacted by this corporation is as follows, to wit:

(1) To purchase, acquire, lease, let, use, maintain and operate canals, aqueducts, reservoirs, tunnels, flumes, ditches and pipes for conducting or storing water for the use of individuals, corporations and incorporated cities or towns or for mining or other purposes; [86]

(2) To construct, purchase, acquire, lease, let, use, maintain and operate wharves, docks, piers, chutes, booms, ferries, bridges, by-roads, canals, ditches, dams, pondings, flumes, aqueducts and pipes for irrigation and supplying mines and farming neighborhoods with water for power or other uses;

(3) To drain and reclaim lands;

(4) To purchase, acquire, lease, let, use, maintain and operate roads, tunnels, ditches, flumes, pipes, and dumping places for working mines;

(5) To construct, maintain and operate by-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery or necessary to reach any property used for public or private purposes;

(6) To purchase, acquire, lease, let, use, maintain and operate canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying, storing and discharging water for or in connection with the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns; and also for furnishing electricity for lighting, heating, or power purposes, to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity

for any of the purposes or uses above set forth; and also to purchase, acquire, lease, hire, construct, maintain and operate electric power lines, electric heat lines, and electric light, heat and power lines;

(7) To assume the obligations of other corporations, companies or persons, and to guarantee the payment of bonds, debentures, notes or other obligations of other corporations, companies or persons;

(8) To exercise the right of eminent domain in behalf of any of the public uses for which it is organized;

(9) To locate, purchase, acquire, lease, hire, buy, sell, hold, mortgage, dispose of, and deal in, water and water rights, water ditches, aqueducts, flumes, canals, reservoirs, dams, springs, buildings and improvements;

(10) To engage in the business of selling, distributing or delivering water for irrigation purposes or for domestic use;

(11) To acquire, purchase, buy, hold, sell, lease, exchange, mortgage and deal in, lands, tenements and hereditaments, and interest of any and all kinds in real estate;

(12) To build, grade, macadamize, and construct streets, roads and distributing plants, and to lay out and plat towns, and townsites, and to build and construct houses and improvements thereon;

(13) To generate, purchase and sell for domestic, private, and public use, electricity, water, gas and electric power, and [87] to carry on the general business of producing, buying, selling, leasing, distributing, and dealing in the same;

(14) To construct, purchase, acquire, hire and and lease, maintain and operate stores, machine shops, warehouses and factories, and to buy, sell, exchange, and deal in personal property of all kinds;

(15) To construct, purchase, acquire, hire, and lease landings, seawalls, and bulkheads of every kind and description; to buy, sell, construct and operate barges, electric and steam vessels and sailing vessels;

(16) To construct, purchase, hire, lease, acquire, conduct, operate and manage hotels, inns, resorts, hospitals and camps;

(17) To reclaim and fill in swamp and overflowed marsh and submerged lands, and to operate dredges, steam shovels, and other machinery for the said or any other purposes;

(18) To buy, sell, purchase, cut, mill, manufacture, and otherwise acquire and dispose of wood, timber, lumber, coal, oil, and other fuel, and to own, and operate, sawmills and wood, lumber and coal yards and oil lands;

(19) To purchase, own, hold and deal in, stock and shares of capital stock, debentures and bonds of other corporations and in securities of all kinds;

(20) To borrow money and to issue bonds, debentures, and notes therefor, and to secure the same by mortgage, pledge, hypothecation, or deed of trust of any or all of the property, rights, privileges and franchises of the corporation, or to secure the same in any or either of said ways;

(21) To purchase, acquire, own, hold, use and exercise franchises, patents, and patent rights, and

to license others to use patents and patent rights;

(22) To acquire, construct, purchase, buy, hold, sell, lease, exchange, mortgage and deal in oil lands, oil, coal lands, oil pipe lines, tramways, telephone and telegraph lines;

(23) To generate electricity, electric power and mechanical power by water, water power, or by coal, oil, gas or other fuel or device;

(24) To do and perform any and all other acts and things necessary, useful, or auxiliary to the main purposes of the corporation.

THIRD. The authorized capital stock of this corporation shall be One Million (1,000,000) Dollars, divided into Ten Thousand (10,000) shares of the par value of One Hundred (100) Dollars each. At such time as the Board of Directors may by resolution direct, said capital stock shall be paid into this corporation in cash, services, or by the sale and transfer to it of real or personal property for the uses and purposes of said corporation, in payment for which, shares of the capital stock of said corporation may be issued, and the capital stock so issued [88] shall thereupon and thereby become and be fully paid up and non-assessable, and in the absence of fraud in the transaction the judgment of the Directors as to the value of the property purchased or services rendered shall be conclusive.

FOURTH. The time of the commencement of this corporation shall be the date of the issuance to it by the Arizona Corporation Commission of a certificate of incorporation, and the termination thereof shall be twenty-five years thereafter with the priv-

ilege of renewal as provided by law.

FIFTH. The affairs of this corporation shall be conducted by a Board of Directors. The first Board shall be elected on the fifteenth day of April, 1913, and shall serve until the first annual Stockholder's Meeting, as hereafter provided, or until their successors are elected. Thereafter the Board shall be elected from among the stockholders at the annual Stockholder's Meeting to be held on the third Tuesday in April of each year.

SIXTH. The directors shall have power to adopt and amend By-Laws for the government of the corporation, to fill vacancies occurring in the Board from any cause, and to appoint an Executive Committee and vest said committee with all of the powers granted to the Directors by these Articles.

SEVENTH. The highest amount of indebtedness or liability, direct or contingent, to which this corporation is at any time subject shall be Six Hundred and Sixty-six Thousand (666,000) Dollars, which amount does not exceed two-thirds of the amount of the capital stock.

EIGHTH. The private property of the stockholders of this Corporation shall be exempt from corporate debts of any kind whatsoever.

NINTH. At any stockholders' meeting of this corporation stock may be voted by proxy.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 8th day of April, A. D. 1913.

FRED H. LARSEN.
M. A. RABBITT.

State of Arizona,
County of Maricopa,—ss.

Before me, Thos. J. Prescott, a Notary Public in and for said County and State, on this day personally appeared Fred H. Larsen and M. A. Rabbitt, to me known to be the persons who subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this eighth day of April, 1913.

[Notarial Seal] THOS. J. PRESCOTT,
Notary Public.

My commission will expire March 18, 1906. [89]

Filed in the office of the Arizona Corporation Commission this 8 day of Apr. A. D. 1913, at 1:30 P. M. at request of The Southwestern Securities & Investment Co., whose postoffice address is Phoenix, Arizona.

ARIZONA CORPORATION COMMISSION,
By W. P. GEARY,
Chairman."

It was admitted by counsel that from December 14, 1908, to the time of the commencement of this action, defendant had been continuously absent from the State of California and from the United States.

It was conceded to be admitted by the pleadings that on September 20, 1906, the defendant entered into an agreement with one L. J. Shuman for the sale of certain lands in Lake County, copy of which agreement was attached as an exhibit to the com-

plaint, and that on or about September 20, 1906, said L. J. Shuman transferred, assigned and set over, the said contract unto J. Dalzell Brown.

It was admitted that on or about November 10, 1906, defendant furnished to said J. Dalzell Brown an abstract of the record title to the real property referred to in said contract of sale.

Over objection of counsel for defendant, the abstract was then admitted in evidence and marked as Plaintiff's Exhibit 1.

Mr. WHEELER.—Before it (the abstract) is marked, I would like to call your Honor's attention to the following matters. On page 14 of the abstract, you will find that the United States issued a patent to Samuel Jones for certain of the property going to make up this Carson Rancho. You will find on page 15 of the abstract that Samuel Jones deeds to B. F. Harbine, A. Levy, and S. C. Hastings, trustees for the stockholders of the Bank of Lake, a corporation. No trust is declared in the instrument. [90]

The COURT.—I suppose it is delivered as security to the trustees of the bank for some loan.

Mr. WHEELER.—The abstract does not show.

The COURT.—Of course, the abstract needn't show, so far as that is concerned, if the instrument to which the record refers is made.

Mr. WHEELER.—But this is the instrument, as will appear here, that is, the effect of the instrument, it is a deed to these people, trustees for the bank; that is the way it reads.

Now on page 16 there appears this deed, B. F.

Harbine, A. Levy and S. Clinton Hastings, trustees for the stockholders of the Bank of Lake, not as trustees for the bank, to B. P. Hastings, and it is through that deed if at all, that the title is deraigned. They received the deed as trustees for the Bank of Lake; they deed from themselves, sign their individual names and acknowledge the deed, as the evidence later on will show, as trustees for the stockholders of the Bank of Lake.

There is also in that abstract, on pages 10 and 11, a deed from A. F. Tate and Frank D. Tunis to A. Levy, B. F. Harbine and S. Clinton Hastings, as trustees for the stockholders of the Bank of Lake, a corporation, and the terms of the trust are given as follows, on page 11:

> "To have and to hold unto the said parties of the second part, and to their successors in trust for the uses and purposes hereinbefore specified, that is to say, to take, manage and control, all and singular the said lands, and the rents, issues and profits thereof, for the sole and exclusive use and benefit of the stockholders of said corporation the said Bank of Lake, and to sell and dispose of said lands, and any part thereof, when and upon such terms and in such quantities as to the said trustees may seem fit, and to apply and dispose of the proceeds of the sales thereof, and of all income from said lands, or the sales thereof, accruing to the uses and benefit as aforesaid of the said stockholders of said corporation, in such proportion to each of said stockholders, as his amount of

stock shall bear to the whole amount of stock therein provided, however, and it is expressly understood, that the said parties of the second part the said trustees, shall make no sale of the said lands or any part thereof, save with the concurrence and consent of all said trustees, manifested by their joining in the execution of the said lands or any part of the same is affected." [91]

I next call your Honor's attention to a patent on page 12, from the United States to Oliver Sprague, and on page 13, Oliver Sprague deeds to A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake, not for the stockholders. Now again, the only way that this title comes out is through the deed acknowledged by these parties as trustees for the stockholders.

It was admitted that on or about December 6, 1906, J. Dalzell Brown reported to defendant in writing certain purported exceptions and objections to defendant's title to said real property, which said objections are contained in a letter addressed to L. J. Shuman, Lakeport, Cal., and signed by Gray & Cooper. Said letter was read in evidence and the attention of the court called to the second, third, seventh, and eleventh objections. Said letter is in words and figures as follows:

Letter, December 6, 1906, Gray & Cooper to Shuman.

Dec. 6, 1906.

Mr. L. J. Shuman,
Lakeport, Cal.

Dear Sir:

We have examined that certain abstract of title to the lands of Heinz Springe, Esq., commonly known as "Carson Rancho" and also "Hudson" and "Gillett" tracts, all being situate in the County of Lake, State of California, made by Lake County Abstract Company, Inc. and dated the 1st day of November, 1906, and containing pages numbered from 1 to 147 inclusive; and also that certain memorandum prepared by Herbert V. Keeling additional to said abstract.

We beg to report that as shown by said abstract and said additional memorandum, title to those certain parcels of land described in that certain agreement between Heinz Springe, Esq., therein designated as the seller, and L. J. Shuman, therein designated as the purchaser, and dated September 20, 1906, was on the date of said abstract, to wit, the 1st day of November, 1906, at 12 o'clock M. vested in Heinz Springe subject to the following exceptions and objections:

First. The property described in the deed shown on pages 2 and 4 of the abstract were at one time owned by Andrew J. Carson; there is in the chain of title (see Abst. page 8) a deed from one A. J. Carson. The identity of the grantor in the deed shown at page 8 with the grantee named in the deed shown

at pages 2 and 4 should be satisfactorily established. [92]

Second. Title to the property described on page 13 of the abstract was deeded by Oliver Sprague, the then owner, to "A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake." The terms of the trust are not set forth in the abstract. If in fact no trust was expressed in the instrument, that fact should be certified to; if on the other hand a trust was declared, the terms thereof should be set forth so that we can determine whether the property was thereafter properly conveyed by the trustees.

Third. Title to a considerable portion of the property under examination became vested in B. F. Harbine, A. Levy and S. Clinton Hastings, as trustees of the Bank of Lake. On page 16 of the abstract there is shown a deed executed by B. F. Harbine, A. Levy and S. Clinton Hastings apparently in their individual capacity. It is therefore objected that title to the property described on page 16 of the abstract is still vested in the persons named as trustees for the stockholders of the Bank of Lake.

Fourth. If however it appears upon further search that the deed last mentioned was properly executed by the trustees in their official capacity, it is objected that the description is erroneous in this, that the Township in which the property is located is given as "Township 13 N. R. 9 West M. D. M." A conveyance should therefore be obtained in any event from the individuals mentioned as trustees.

Fifth. The tracts of swamp and overflowed lands situate in Section 28, Township 15 North, Range 9

West, M. D. B. & M., were obtained from the State of California (abstract page 25); but the parcels of land firstly and secondly described in the patent shown on page 25 of the abstract do not appear to be contiguous; there is therefore in the northwest quarter of said Section 28 a small parcel of land which is not covered by the State patent.

Sixth. The lands described in page 28 of the abstract were patented by the State of California to a predecessor in interest of Mr. Springe, but there is no evidence showing that the lands were ever listed by the United States to the State of California; this evidence should be supplied.

Seventh. Title to most of the property under examination was at the time of his death vested in Robert P. Hastings; his estate was probated in the Superior Court of the City and County of San Francisco, State of California, and the decree of final distribution entered in that estate is shown on the abstract pages 30 and following; there is, however, nothing to show that the Court had any jurisdiction to make the decree of final distribution. Proceedings in the matter of the estate of Robert P. Hastings, deceased, taken in the Superior Court of the City and County of San Francisco, should be restored so that it will appear of record that the Court had acquired jurisdiction to administer the said estate. Title is therefore objected to on the ground that it does not appear of record that title has passed from Robert P. Hastings.

Eighth. If the said decree given and made in the Estate of Robert P. Hastings, deceased, was effective

to pass title, evidence should then be supplied that the distributee named in said decree, namely, Mary C. Hastings, thereafter married James Daniell of London, England.

The judgment obtained by the Banque Continentale de Paris in the foreclosure action brought against Mary Jane Daniell and others should be satisfied of record.

Ninth. The property is still subject to the lien of the mortgages shown at pages 91 and 93 and to the writ of attachment issuing out of the Superior Court of the City and County of San [93] Francisco in the action brought by Robert Morris vs. Mary Daniell.

NOTE. The mortgagees, Henry Lovegrove and Solomon Baron and said plaintiff Robert Morris were made parties defendant in the foreclosure suit brought by the Banque Continentale de Paris vs. Mary Jane Daniell above mentioned. It is probable that their rights were foreclosed in that proceeding, but the abstract as prepared does not show that jurisdiction of their persons was obtained or that their rights were in fact foreclosed. The proceedings in this action should be more fully set forth so that whether these rights are still outstanding may be determined.

Tenth. On page 88 is shown a mortgage from Mary Jane Daniell to Arthur Hepburn Hastie and others. On page 94 there is shown a satisfaction of mortgage which purports to satisfy the mortgage shown on page 88; this release is, however, signed by

A. H. Hastie, W. G. Blakeston, A. G. Probyn-Williams, A. J. Langdon and Hinton J. Bailey; the mortgagors are respectively Arthur Hepburn Hastie, William Graham Blakeston, Arthur Charles Probyn-Williams, George James London, and Hinton James Baily, copartners under the firm name or style of Messieurs Hastie. The identity of those signing the release with those mentioned in the mortgage should be established.

Eleventh. Title to the property described in deed shown on page 39 was vested at one time in Frederick Clay Tyndale Van Sandau; the deed on page 39 purports to run from Frederick Clay Tyndale Van Sandaw and is signed E. C. T. Van Sandau. The identity of the person executing this deed with the grantee in the deed shown on page 37 should be established.

Twelfth. To that portion of the property excepted from the operation of the deed executed by Herbert V. Keeling and his wife to Heinz Springe, shown on pages 31 and 32 of the abstract, Heinz Springe has no title.

Thirteenth. To the northeast quarter of the northeast quarter of Section 21, Township 15 North, Range 9 West, no title is shown; we note, however, on the map a statement that a certificate of purchase has been issued on this parcel and on examining abstract we find that this parcel was conveyed to Frederick Clay Tyndale Van Sandau and by him to Herbert V. Keeling, and whatever title was conveyed to Mr. Keeling is still vested in him; if any title or right passed to Mr. Keeling by virtue of the deed shown on pages 39 and 40, a quitclaim deed from Mr. Keeling

should be obtained and the rights obtained under the certificate of purchase should be prosecuted to patent.

Fourteenth. In curing certain defects then existing to the title of the property under examination, deed was taken from Charles Foster Dio Hastings and his wife (see page 47). That deed fails to convey the northeast one-quarter of the southwest one-quarter of Section 21, Township 15 North, Range 9 West.

> NOTE. This deed purports to convey the northeast one-quarter of the northwest one-quarter of said Section; this may be a stenographic error only; if not, quitclaim deed should be obtained from Charles Foster Dio Hastings covering this parcel.

Fifteenth. A portion of the property under search, to wit, the north half of the northwest quarter and the southwest [94] quarter of the northwest quarter of Section 26, Township 15 North, Range 9 west was at one time vested in William L. Benefiel; on page 106 is shown a deed executed by one W. L. Benefiel. The identity of said W. L. Benefiel with said William L. Benefiel should be proven.

Sixteenth. Title to a portion of the property under search was at his death vested in David Hudson (for description see page 109 of the abstract). Enough of the proceedings taken in the Superior Court of the County of Mendocino, State of California, in the Matter of the Estate of David Hudson, deceased, should be given to show that the Court had jurisdiction of the said Estate of David Hudson to make the decree shown on page 109.

Seventeenth. Assuming that the decree of final distribution in the matter of the Estate of David Hudson, deceased, shown on page 109 of the abstract was properly given and made, the identity of the grantor named in the deed shown at page 111 with Elbert Hudson, one of the distributees mentioned in the decree of final distribution in the matter of the Estate of David Hudson, deceased, shown at pages 108 and following of the abstract should be shown.

Eighteenth. The decree and judgment obtained in the Superior Court, County of Lake in the action brought by Zilphia A. Carly vs. R. J. Hudson should be satisfied on the docket.

Nineteenth. The identity of the grantor in the deed shown at page 123 with the grantee in the deed shown at page 122 should be established.

Twentieth. A portion of the property, to wit, the northeast quarter of the northeast quarter of Section 28, Township 15 North, Range 9 West, M. D. M., was patented by the United States of America to Peter S. Burk. There is in the chain of title (see abstract, page 125) a deed purporting to run from one Peter S. Burke to Charles W. Gillett; this deed is however signed P. S. Burke. The identity of the person executing this deed with the said patentee should be established.

Twenty-first. Title to that portion of the property under examination described on page 129 of the abstract became at one time vested in John W. Jones; on page 130 there is shown a deed from J. W. Jones. The identity of the grantor in this last-named deed

with the grantee in deed shown on page 129 should be established.

Twenty-second. Title to that portion of the property under search which is described on page 135 of the abstract was at the time of his death vested in one Charles W. Gillett. Heinz Springe makes title to this portion of the property through one Green Bartlett who became purchaser of the property at a sale had in the course of the administration of the estate of Charles W. Gillett, deceased. This sale was invalid and no title passed thereby. This sale is invalid for the following reasons:

1st: The petition for the order of sale does not contain the matters required by law; and

2nd: No valid order to show cause was ever given or made by the Court.

Note. See Campbell vs. Drais, 125 Cal. 253.

Decintha H. Gillett is the surviving wife and the sole devisee of said C. W. Gillett. The estate has not yet been distributed; but as soon as it is distributed, if the decree [95] of distribution carries the general omnibus clause, then a deed from Mrs. Gillett would cure this defect; a grant, bargain and sale deed should at this time be taken from Decintha H. Gillett.

Twenty-third. There however being a possibility that title did pass by the proceedings and that there are in existence facts of which the abstract gives us no notice, it is important that whatever title was obtained by said Green Bartlett be secured. The deed from Green Bartlett to John W. Jones shown at page 129 is in the chain of title but said deed was

executed by Green Bartlett by R. W. Crump, his attorney in fact; the power of attorney was given some years previous and proof should be made that at the time of the execution of the deed, said Green Bartlett was alive and *sui juris.*

Twenty-fourth. The northeast quarter of the northeast quarter of Section 28, Township 15 North, Range 9 West was deeded to the State for delinquent taxes in 1881; redemption of this property should be made.

Very truly yours,

C. A. G. /BSA.

Plaintiff then offered in evidence a letter from Herbert V. Keeling, dated Lakeport, Cal., Feb. 19, 1907, which letter was received in evidence and marked Plaintiff's Exhibit 2. It was admitted that Mr. Keeling was preparing the abstract for defendant and had authority to write said letter. Said letter is in words and figures as follows:

Plaintiff's Exhibit 2—Letter, February 19, 1907, Keeling to Shuman.

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., Feb. 19, 1907.

Mr. L. J. Shuman,
Lakeport, Calif.

My dear Sir:

I am directed by Mr. Heinz Springe to give you formal notice, as vendee of his property on Clear Lake, that the objections to the title as made by Messrs. Gray and Cooper have been examined, and

that the same are not considered sufficient by him to render the title unmerchantable or obnoxious under the terms of his agreement with you.

Yours very truly,
HERBERT V. KEELING. [96]

Plaintiff then introduced in evidence letter from L. J. Shuman to Herbert V. Keeling, dated March 18, 1907, which letter was received in evidence and marked Plaintiff's Exhibit 3, and is in words and figures as follows:

Plaintiff's Exhibit 3—Letter, March 18, 1907, Shuman to Keeling.

Lakeport, Cal., March 18, 1907.

Mr. Herbert V. Keeling,
Lakeport, Cal.

Dear Sir:

I duly received yours of February 19th, giving notice that Mr. Heinz Springe does not consider the objections to his title made by Messrs. Gray & Cooper sufficient to render the title unmerchantable or obnoxious under the terms of his agreement with me.

I beg to call your attention to the following provision of the contract between Mr. Springe and myself:

> "The seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not to exceed ninety days, after the receipt by the seller of said written re-

port, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price."

Under the option granted me I elect to insist upon the specific performance of Mr. Springe's agreement to sell. This agreement includes, you will note, an undertaking on the part of Mr. Springe "To remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections."

I therefore insist upon the removal of all the objections specified by myself in the written report heretofore delivered, which render the title to Mr. Springe's property unmerchantable.

I also give notice that I will extend your time to remove said defects until the first day of September, 1907. [97]

I also call your attention to the following provision of said contract:

"The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale conveying title to said above-described parcels of land and payment of said last installment of twenty-eight thousand five hundred ($28,500) dollars of the purchase price are concurrent conditions."

Kindly advise me whether your client's declination to remove the defect specified is final. If so, I hereby give notice that I will hold Mr. Heinz Springe liable for all damages suffered or occasioned by reason of his refusal to remove the said specified defects.

Yours very truly,

L. J. SHUMAN.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to L. J. Shuman, dated Lakeport, Cal., April 13, 1907, which said letter was received in evidence and marked Plaintiff's Exhibit 4, and is in words and figures as follows:

Plaintiff's Exhibit 4—Letter, April 13, 1907, Keeling to Shuman.

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Cal., April 13, 1907.

L. J. Shuman, Esq.,
Lakeport, Cal.

Dear Sir:

In the matter of the objections made to the title to the lands of Heinz Springe, as contained in the report made by Messrs. Gray and Cooper, I would now advise you that Mr. Springe has finally decided to proceed and remove all such objections so far as he reasonably *do so.* He has accordingly instructed me to take up this matter, and to do all that may be required to remove the objections as soon as possible.

Yours very truly,

HERBERT V. KEELING.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to Messrs. Gray & Cooper, dated Lakeport, Cal., April 16, [98] 1907, which said

letter was received in evidence and marked Plaintiff's Exhibit 5, and is in words and figures as follows:

Plaintiff's Exhibit No. 5—Letter, April 16, 1907, Keeling to Gray & Cooper.

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., Apr. 16, 1907.

Messrs. Gray and Cooper,
Kohl Building,
San Francisco, Calif.

Gentlemen:

Mr. Heinz Springe, the owner of the Carson Rancho, has now directed me to proceed in the matter of clearing up the objections as made by you to the title of his lands. I understand that he has seen you personally in regard to these objections, and that you are willing to waive certain of them. The eighth objection he had crossed off from the list, and possibly there are others that do not need attending to. Kindly let me know just how matters stand so that I may proceed accordingly.

Yours very truly,
HERBERT V. KEELING.

Plaintiff then introduced in evidence copy of letter from Messrs. Gray & Cooper to Herbert V. Keeling (it being admitted that Messrs. Gray & Cooper signed the original thereof), dated May 7, 1907, which said letter was received in evidence and marked Plaintiff's Exhibit 6, and is in words and figures as follows:

Plaintiff's Exhibit No. 6—Letter, May 7, 1907, Gray & Cooper to Keeling.

May 7, 1907.

Mr. Herbert V. Keeling,
Lakeport, Cal.

Dear Sir:

Your favor concerning the objections to Heinz Springe's title came duly to hand. Please pardon our delay in answering.

We realize, of course, that a number of our objections are quite formal and we have no doubt they can easily be met. For instance the objections based upon the fact that property was taken by a man in his full name and conveyed by him by an instrument which described him by his initials only. There is, of course, no presumption of identity of person by identity of initials, and we should have in these cases the affidavit of some person familiar with the facts to establish the identity of the grantee in one deed with the grantor in the other. [99]

The sixth, eighth and tenth objections are waived but we think that the other objections should be met in some satisfactory manner. The twenty-second objection is the most serious objection made.

We regret the necessity of urging these objections but will be glad to make compliance with our request that the defects noted be corrected as easy as possible.

We will also say that we are at all times open to conviction that any particular objection made is not

tenable and will be glad to discuss with you any of the objections you deem unsound.

Yours very truly,

G/W.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to Edward O. Allen, dated Lakeport, Cal., June 24, 1907. Said letter was received in evidence and marked Plaintiff's Exhibit 7, and is in words and figures as follows:

Plaintiff's Exhibit No. 7—Letter, June 24, 1907, Keeling to Allen.

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., June 24, 1907.

Edward O. Allen, Esq.,
Union Trust Building,
San Francisco, Calif.

Dear Sir:

I enclose herewith copy of my report upon the objections made by Messrs. Gray and Cooper to the title of the lands of Heinz Springe, Esq. I have sent the original contract to Messrs. Gray and Cooper, as we have been corresponding directly about the points of objection and thought it would save time to send it to them.

I leave on the 25th inst., for my vacation, and should you have occasion to write to me at any time during my absence, my address for the next two months will be Blyton Lodge, Catharine Road, Sutbiton, Surry, England.

Yours very truly,

HERBERT V. KEELING.

(Enc.)

Plaintiff then introduced in evidence letter addressed to Messrs. Gray & Cooper, signed by Herbert V. Keeling, dated Lakeport, Cal., June 19, 1907, said letter being an enclosure originally contained in Plaintiff's Exhibit 7, but now offered separately. Said letter was received in evidence and marked Plaintiff's Exhibit 8, and is in words and figures as follows: [100]

Plaintiff's Exhibit No. 8—Letter, June 19, 1907, Keeling to Gray & Cooper.

Lakeport, Cal., June 19, 1907.

Messrs. Gray and Cooper,
Kohl Building,
San Francisco, Cal.

Gentlemen:

In the matter of the objections to the title of the lands of Heinz Springe, Esq., commonly known as "Carson Rancho," and also, "Hudson and Gillett" tracts, I would now report that I have met all objections as far as practicable. These objections are contained in your letter of the 6th day of December last, addressed to Mr. L. J. Shuman, and for convenience I treat the objections in the same order as set out in your report.

FIRST: This objection is met by affidavit of W. W. Greene, a long time resident of this county, and who knows Andrew J. Carson to be the same person as A. J. Carson. This affidavit is marked "Exhibit 1."

SECOND: No trust is declared in the deed made by Oliver Sprague to A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake.

THIRD: The deed shown on page 16 of the abstract is signed by B. F. Harbine, A. Levy and S. C. Hastings, as shown therein, but the certificate of acknowledgment shows that they executed this deed as trustees of the Stockholders of the Bank of Lake, and in addition there is a ratification executed on behalf of the President and Secretary of said Bank. This certificate of acknowledgment and ratification is now set forth in full and marked "Exhibit 2."

FOURTH: The wrong township is described in the abstract on page 16, it being township *15* North Range 9 West, M. D. M., and not Township *13* North Range 9 West, M. D. M. This mistake was corrected in the office copy of the abstract but not in the original. I would ask, therefore, to kindly correct the abstract so as to remedy this apparent defect.

FIFTH: The tracts of Swamp and Overflowed Lands situate in Section 28, Township 15 North, Range 9 West, M. D. M., are not entirely contiguous, and their particular location is now shown on plat marked "Exhibit 3."

SIXTH: This objection is waived under your advices of May 7th, last.

SEVENTH: It has been impossible to obtain any of the proceedings in the matter of the estate of Robert P. Hastings, deceased, except the Decree of Distribution which appears of record in the office of the County Recorder of this County. I made enquiry from all parties who might be likely to have such records, including the attorneys for the estate, as well as the agent for the Hastings family. All of these records were destroyed in the San Francisco

fire last year and cannot be replaced. An exact entire copy of the decree as shown of record is now presented and marked "Exhibit 4," and I trust this will furnish a sufficient presumption that the Superior Court of the City and County of San Francisco obtained such jurisdiction over the estate to enable it to make such decree. [101]

EIGHTH: This objection is waived by your advices of May 7th, last.

NINTH: The foreclosure proceedings in the suit of the Bank Continentale de Paris vs. Daniell, et al., show that the mortgagees, Henry Lovegrove and Solomon Baron, and, also, the judgment creditor, Robert Morris, were foreclosed of all their right, title and interest, in and to the property by the decree of foreclosure rendered. These proceedings are now set up in extended form, and are marked "Exhibit 5."

TENTH: This objection is waived by your advices of May 7th, last.

ELEVENTH: This objection I have not yet been able to complete. I sent some while ago a further deed for execution by Frederick Clay Tyndale Van Sandau, but as he lives in Paris, France, it has not yet been returned to me. In any event I anticipate no difficulty in meeting this objection, and the deed will be forwarded to you as soon as it arrives.

TWELFTH: That portion of the property excepted from the operation of the deed executed by Herbert V. Keeling and wife, to Heinz Springe, is not a part of the lands contracted for and agreed to be sold.

THIRTEENTH: The only evidence of title owned by Mr. Springe to the NE. ¼ of NE. ¼ of Section 21, Township 15 North, Range 9 West, is under Certificate of Purchase No. 4555 issued by the Register of the State Land Office to M. S. Sayre on November 7th, 1903. This Certificate was duly assigned by Mr. Sayre to Heinz Springe on September 20th, 1906, and both the certificate of purchase and assignment appear of record in the office of the County Recorder of the said County of Lake. In order to divest any title the writer may have in this forty acres I have now prepared a quit-claim deed which has been recorded, and is marked "Exhibit 6."

FOURTEENTH: The defect noted in the deed made by Charles Foster Dio Hastings and wife to Mary Jane Daniell is a clerical one, it having been corrected in the office copy of the abstract but not in the original. This deed conveys the NE. ¼ of *SW* ¼ of Section 21, Township 15 North, Range 9 West, and the description given in the Abstract as the NE. ¼ of *NW.* ¼ of said Section, is erroneous and should be corrected.

FIFTEENTH: The identity of William L. Benefiel with W. L. Benefiel is now evidenced by affidavit of Decintha H. Gillett, marked "Exhibit 7."

SIXTEENTH: The proceedings in the estate of David Hudson, deceased, as taken in the Superior Court of Mendocino County, State of California, are now sufficiently given to show that the Court had jurisdiction of said estate to make the decree shown on page 109. These proceedings are under certificate

of Smith Donohoe & Company, a corporation, and are marked "Exhibit 8."

SEVENTEENTH: The identity of Elbert Hudson with E. Hudson is now shown by original affidavit of said Elbert Hudson marked "Exhibit 9."

EIGHTEENTH: The decree and judgment obtained in the [102] Superior Court of the County of Lake, in the action brought by Zilphia A. Carly against R. J. Hudson is satisfied by the original entry in the Clerk's Judgment Book as shown by "Exhibit 10."

NINETEENTH: The identity of William A. Black with W. A. Black is now shown by the original affidavit of Decintha H. Gillett, marked "Exhibit 11."

TWENTIETH: The identity of Peter S. Burke with P. S. Burke is now shown by original affidavit of Decintha H. Gillett, marked "Exhibit 12."

TWENTY-FIRST: The identity of John W. Jones with J. W. Jones is now shown by a further deed executed by John W. Jones to Heinz Springe, and which said deed has been duly recorded in the office of the County Recorder of the County of Lake. This deed is marked "Exhibit 13."

TWENTY-SECOND: This objection is met by the execution of a grant, bargain, and sale deed on behalf of Decintha H. Gillett, the surviving wife and sole devisee of C. W. Gillett, deceased, to Heinz Springe, and which deed has been duly recorded in the office of the County Recorder of Lake County This original deed is marked "Exhibit 14." I, also, attach further probate proceedings in the matter of

the estate of C. W. Gillett, deceased, showing that a final decree of distribution was made, and which carried the general omnibus clause. These proceedings are marked "Exhibit 14a."

TWENTY-THIRD: The affidavit of C. M. Crawford meets this objection and shown that Green Bartlett was living at the time the deed was executed from him, by his attorney-in-fact to John W. Jones shown on page 129 of the abstract. The fact of Green Bartlett being living at this date is also in the knowledge of the writer. This affidavit is marked "Exhibit 15."

TWENTY-FOURTH: The tax sale noted has now been redeemed, as shown by certificate of redemption herewith marked "Exhibit 16," and which certificate of redemption has been duly recorded in the office of the County Recorder of the County of Lake. The Certificate of Redemption is marked "Exhibit 16."

The above practically disposes of all of the objections as made by you and I trust you will find them sufficient. It has entailed quite an amount of labor and travel to secure the various affidavits and other documents. I have left instructions to have the deed from Mr. Van Sandau forwarded at once to you upon its arrival here.

As already advised I shall be absent for the next two months but all communications addressed to my office will receive prompt attention, as I have made arrangements for carrying on my business while away. Should there be occasion to write to me direct during the months of July and August my address

will be Blyton Lodge, Catherine Road, Surbiton, Surry, England.

In the meantime, I am,

Yours very truly,

HERBERT V. KEELING. [103]

It was admitted by counsel for defendant that when Mr. Keeling went away on a certain vacation mentioned in one of the foregoing letters, he left Mr. H. B. Churchill in charge of his office and business and in charge of clearing up certain matters with regard to the title to the lands in question.

Plaintiff next offered in evidence a certain letter signed Lake County Title & Abstract Company, Incorporated, Herbert V. Keeling, Manager, by H. B. Churchill, Assistant Manager, to Messrs. Gray & Cooper, and dated June 27, 1907. This letter was received in evidence and marked Plaintiff's Exhibit 9, and is in words and figures as follows:

Plaintiff's Exhibit No. 9—Letter, June 27, 1907, Lake County Title & Abstract Co. to Gray & Cooper.

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., June 27, 1907.

Messrs. Gray and Cooper,

Kohl Building,

San Francisco, Calif.

Gentlemen:

I have this day received the proposed deed from Van Sandau to Heinz Springe but upon examining the deed I find that Mr. Van Sandau has failed to

acknowledge the same and I am, therefore, returning the deed to him for execution. This, of course, will necessitate a further delay and when the deed is returned to me I shall advise you.

Yours very truly,

LAKE COUNTY AND ABSTRACT COMPANY, INC.,

HERBERT V. KEELING,

Manager.

By H. B. CHURCHILL,

Asst. Man.

Plaintiff next offered in evidence a letter signed by H. B. Churchill addressed to Messrs. Gray & Cooper, dated August 7, 1907, under the letterhead of Herbert V. Keeling, which letter was received in evidence and marked Plaintiff's Exhibit 10, and is in words and figures as follows:

Plaintiff's Exhibit No. 10—Letter, August 7, 1907, Churchill to Gray & Cooper.

Lakeport, Cal., August 7th, 1907.

Messrs. Gray and Cooper,

Kohl Building,

San Francisco, Cal.,

Gentlemen:

Re Springe Title.

I beg to advise you that I am now in receipt of the deed from Mr. Van Sandau to Mr. Springe, and I take it that [104] this should be recorded, however as I am not familiar with this whole proceeding I will await your advices in this detail.

Yours very truly,

H. B. CHURCHILL.

Plaintiff then introduced in evidence a copy of a letter dated September 3, 1907, addressed to Herbert V. Keeling, Esq., purporting to be signed by Gray & Cooper. This letter was admitted in evidence and marked Plaintiff's Exhibit 11, and is in words and figures as follows:

Plaintiff's Exhibit No. 11—Letter, September 3, 1907, Gray & Cooper to Keeling.

Sept. 3rd, 1907.

Herbert V. Keeling, Esq.,
Attorney at Law.
Lakeport, Cal.

Dear Sir:

Referring to your several favors of recent date, we beg to reply as follows:

Re MARINER TITLE—Objection #3.

Certainly the evidence adduced by you in connection with this matter is persuasive, but we regret that it is not record evidence, and if Agnes Meggat will not quit-claim the property we see no other way of clearing the record than by a suit to quiet title.

Re OLIVE C. TAYLOR—Abstract #563—Objection #2.

With reference to the trustees elected to hold, rent or sell real estate for the Bank of Lake, we beg to observe that, so far as we know, the California Courts have not sanctioned the appointment of such committees by Boards of Directors of corporations. The corporate powers are vested in the Board of Directors and must be exercised by that Board.

Hence it will be necessary to obtain the quit claim of the Bank. You will note the same objection arises in the Springe abstract and the quiet claim of the bank will likewise have to be obtained in that matter.

Re L. A. G. STONE—Abstract #552—Objection #2.

If the corporate seal of the California Agricultural and Improvement Association is affixed to the deed, a copy of which is enclosed in your favor of August 23rd, we will waive this objection.

Re SPRINGE TITLE—Abstract #494.

(1) Objection #3. To clear this matter we suggest that the quit claim of the Bank of Lake be obtained covering the property described on page 16 of the abstract.

(2) Objection #7. Advantage should be taken of Section 1 of Chapter 55 of the Statutes passed at the special session of the Legislature of 1906, thereby making the decree a record of the Superior Court of San Francisco County. Until this is done, we do not believe that there is sufficient record evidence of Mr. Springe's title.

Very truly yours,

A/E. **[105]**

The truth of certain allegations contained in the answer on file in this action, at page 16 thereof, was then admitted by plaintiff. These allegations are as follows:

That thereafter, on or about the 12th day of September, 1907, the said Brown, at the in-

stance and request of defendant, waived in writing a tender by defendant of a deed of the said premises on the 15th day of September, 1907 as called for by said agreement Exhibit "A."

Said Brown did sign and deliver to the defendant such a waiver, which is in words and figures following: "San Francisco, Cal., September 12, 1907. Mr. Heinz Springe, care of Eugene Levy, Esq., San Francisco, Cal. Dear Sir: With reference to the contract for purchase and sale entered into between yourself and L. J. Shuman, wherein you agreed to convey your Lake County property, with certain exceptions, to Mr. Shuman, or his assignee, I beg to confirm the statement already made that I am Mr. Shuman's assignee; I understand that Mr. Springe is now in Paris; that he has signed and acknowledged a deed conveying the property described in the contract with Mr. Shuman to the California Industrial Company, and that this instrument is now in San Francisco; and that Mr. Springe has in San Francisco no attorney in fact. In confirmation of the understanding reached between Mr. Levy and Mr. Gray, I hereby waive the production of a deed from Mr. Springe to myself on the day specified in the contract between yourself and Mr. Shuman, the understanding between us being that you will with all diligence cause to be delivered to me upon payment of the balance of the pur-

chase price due a proper deed conveying the property under consideration to myself.

Respectfully yours,

(Signed) J. DALZELL BROWN."

Plaintiff then introduced in evidence a copy of a letter sent by Charles A. Gray of the firm of Gray & Cooper, dated September 12, 1907, and addressed to Eugene Levy, attorney and agent for the defendant. This letter was received in evidence and marked Plaintiff's Exhibit 12, and is in words and figures as follows:

Plaintiff's Exhibit No. 12—Letter, September 12, 1907, Gray & Cooper to Levy.

Sept. 12th, 1907.

Mr. Eugene Levy,
2318 Clay Street,
San Francisco, Cal.

Dear Sir:

In accordance with the understanding reached the other day, I have obtained from Mr. Brown a writter waiver of the production of a deed from Mr. Springe on the specified day mentioned in the agreement between Mr. Springe and Mr. Shuman.

Our understanding is that you will with all diligence obtain from Mr. Springe a deed conveying the **[106]** property to Mr. Brown, Mr. Shuman's assignee.

Yours very truly,

A/E.

Plaintiff then introduced in evidence a letter admitted to bear the signature of Eugene W. Levy,

addressed to Mr. Gray, dated September 14, 1907. This letter was received in evidence and marked Plaintiff's Exhibit 13, and is in words and figures as follows:

Plaintiff's Exhibit No. 13—Letter, September 14, 1907, Levy to Gray.

(Letterhead: Eugene W. Levy, Attorney and Counsellor at Law, 1424 Gough Street.)

San Francisco, Sept. 14, 1907.

My dear Mr. Gray:

I am in receipt of your esteemed favor of the 12th inst., enclosing written waiver of Mr. J. Dalzell Brown, for which I thank you. I will do my best to obtain the deed at the earliest possible day.

Yours very truly,

EUGENE W. LEVY,

Chas. A. Gray, Esq.,
Kohl Building.

Plaintiff next accepted what he characterized to be an admission contained in the original answer on file herein, bearing the verification of the defendant. The allegations relied upon as an admission appear in paragraph 9 of the answer and are in words and figures as follows.:

> That on or about the 10th day of December, 1907, this defendant who was then residing in Paris, France, came to California to determine what action should be taken by him to enforce the said contract of sale of September 20, 1906, and to protect the said real property therein described.

While plaintiff conceded that the foregoing allegation had been stricken from the answer, counsel for plaintiff offered [107] the foregoing not as an admission contained in the pleading, but as an admission against interest, contending that the statement contained therein with regard to enforcing this contract was a recognition of its existence on December 10, 1907.

Plaintiff then read in evidence the following allegations contained in the answer to the amended complaint, in paragraph 2 of page 24, which were characterized by him as an admission, and which are in words and figures as follows:

That on the 14th day of December, 1907, the said J. Dalzell Brown, made and entered into with Central Counties Land Company a corporation organized and existing under and by virtue of the laws of the State of California, a contract for the sale of 1700 acres of the lands described in said sales contract of September 20, 1906, a copy of which agreement is as follows, to wit:

"OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars ($1000) to me paid, the receipt whereof is hereby acknowledged, I, *L.* DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Seven Thousand ($67,000) Dollars all that property, containing seventeen hundred (1700)

acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M., lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN, on the part of HEINZ SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be made as follows to wit: namely the sum of Thirty Thousand Dollars ($30,000) in United States Gold Coin, and the balance of Thirty-Seven Thousand Dollars ($37,000) in authorized debenture certificates of said Central Counties Land Company at par value, to wit, $500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain and sale deed conveying a good title to the above described property, free and clear of all liens and incumbrances.

San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown.

EDWARD O. ALLEN." **[108]**

It appears from the record that the following colloquy took place:

Mr. WHEELER.—Gentlemen, I offer to make the following admission, which may expedite matters, and see if you can accept it in this form: I offer to admit it as follows: That on the 17th day of December, 1907, at the city and county of San Francisco, the defendant Springe, caused a deed, an instrument sufficient in form, to convey the property here in question; I say sufficient in form without any admis-

sion as to the title, to be offered to J. Dalzell Brown, at a time when Brown was confined in the city prison in the city and county of San Francisco.

Mr. HENSHALL.—No.

Plaintiff then made an admission of the allegation contained in paragraph 19 of defendant's answer, page 20 thereof, as follows:

> That thereafter, on the 16th day of January, 1908, at the County of Lake, State of California, this defendant brought an action herein as plaintiff against the said J. Dalzell Brown in the Superior Court of the said County of Lake, said State of California, said action being entitled, "In the Superior Court of the State of California, in and for the County of Lake, Heinz Springe, Plaintiff vs. J. Dalzell Brown, John Doe Simons and Alfred White (hereby sued by fictitious names), Defendants," same being Superior Court No. 1789, said action being an action in ejectment against the said J. Dalzell Brown and certain other persons to eject the said J. Dalzell Brown and said other persons from the possession of the real property described in said sales contract of date September 20, 1906, and for the possession of said real property.
>
> That appended hereto is a copy of said defendant's complaint in ejectment in said last mentioned action, which copy of complaint is marked "Exhibit 1," and by reference made a part of this answer.

Plaintiff then introduced in evidence said complaint in ejectment, which said complaint is attached to defendant's answer herein as Exhibit 1 thereof, and is hereby referred to and made a part hereof. [109]

Plaintiff then admitted the truth of the following allegation contained in paragraph 20 of the answer, said paragraph appearing at page 21 thereof:

> That thereafter, on or about the 27th day of April, 1908, said J. Dalzell Brown appeared in said last mentioned action by his attorney at law, Edward O. Allen, the purported assignor of the plaintiff herein, and filed his verified answer in said action, a copy of which answer is hereto attached, marked "Exhibit 2" and by reference made a part of this answer.

Plaintiff then introduced in evidence said answer in said ejectment suit, which said answer is attached to defendant's answer herein as Exhibit 2 thereof, and is hereby referred to and made a part hereof.

Plaintiff then introduced in evidence an assignment of J. Dalzell Brown to Edward O. Allen, and an assignment from Edward O. Allen to plaintiff herein. Said two assignments were bound in one cover and were marked Plaintiff's Exhibit 14, which said exhibit is in words and figures as follows:

Plaintiff's Exhibit No. 14—Assignment, April 24, 1913, Allen to Power and Irrigation Co. of Clear Lake, etc.

ASSIGNMENT.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned J. DALZELL BROWN, in consideration of the sum of Ten Dollars U. S. Gold Coin, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over unto EDWARD O. ALLEN, of the City and County of San Francisco, State of California, all his right, title and interest whatsoever in, to and under that certain agreement entered into on the 20th day of September, 1906, between Heinz Springe and L. J. Shuman for the sale of certain real property situate in the County of Lake, State of California, commonly known as the "Carson Rancho," all the right, title and interest of said Shuman in which said agreement having been assigned, transferred and conveyed to the undersigned by said Shuman on said 20th day of September, 1906; also all rights in and to any money paid under said tract, including all rights arising from the making of any payments and to the recovery back of the money so paid; also all rights to recover any money or moneys or damages from said Heinz Springe and belonging to said J. Dalzell Brown.

IN WITNESS WHEREOF said J. Dalzell Brown

has hereunto set his hand and seal this 28th day of May, A. D. 1908.

J. DALZELL BROWN.

Witness:

H. B. ODGERS. **[110]**

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Edward O. Allen, the assignee mentioned in the within and foregoing assignment, for and in consideration of the sum of one dollar to him in hand paid, receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and does by these presents sell, assign, transfer and set over, unto POWER AND IRRIGATION COMPANY OF CLEAR LAKE, an Arizona corporation, the above and foregoing assignment, and any and all rights accrued or accruing thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 1913.

EDWARD O. ALLEN.

Witness:

CHARLES S. WHEELER.

The authenticity of the signatures subscribed to the foregoing assignments was admitted by plaintiff.

Plaintiff introduced in evidence the findings of fact and conclusions of law in said ejectment suit entitled Heinz Springe vs. J. Dalzell Brown et al., which said findings are attached to defendant's answer herein as Exhibit 4 thereof, and which said findings are hereby referred to and made a part hereof.

Plaintiff then admitted the truth of the allegation contained in paragraph 23, at page 22 of the answer, said allegation being in words and figures as follows:

> That thereafter, on the 26th day of May, 1908, there was duly made and entered in said ejectment suit the judgment of said last-mentioned Court in said action, a copy of which judgment is hereto attached, marked Exhibit 5 and by reference made a part hereof. That said judgment was duly given and made against the defendants therein named, including the said defendant, J. Dalzell Brown, one of the assignors of the plaintiff herein. The said judgment has not been set aside, modified or reversed, and no appeal has been taken therefrom, and that the same remains in full force and effect.

It was then admitted by defendant that in connection with the foregoing judgment, no motion for a new trial was ever made and no appeal from said judgment was ever taken. Defendant would not [111] concede, however, that there was never a stay of proceedings under said judgment.

Plaintiff then introduced in evidence said judgment in said ejectment suit, which said judgment is attached to defendant's answer herein as Exhibit 5 thereof, and is hereby referred to and made a part hereof.

With the consent of the defendant, plaintiff then introduced in evidence a copy of a letter dated June 2, 1908, addressed to Heinz Springe, the original

having been signed by Edward O. Allen. Said letter was received in evidence and marked Plaintiff's Exhibit 15, and is in words and figures as follows:

Plaintiff's Exhibit No. 15—Letter, June 2, 1908, Allen to Springe.

June 2nd, 1908.

Mr. Heinz Springe,
c/o Messrs. Galpin, Elkins & Frost,
Metropolis Bldg., City.

Dear Mr. Springe.

I have just written to Mr. J. W. Symons, our agent and overseer who has been occupying your property on Clear Lake, to deliver possession thereof to you whenever you ask for the same; that is in pursuance of the judgment recently rendered in the ejectment suit and is of course subject to any of the rights of this Company and of J. Dalzell Brown arising from the contract of sale of the property, and to appeal from the judgment.

May I presume to recommend Mr. Symons as a desirable overseer or foreman? We have found him very capable and trustworthy and are perfectly satisfied that he has taken the best care of the property under existing circumstances; his pay has been $75.00 per month and food supplies.

Mr. Symons has also brought to my attention the fact that certain persons are renting the property for pasturage. I submit that such rental should inure to us until the date of our quitting possession, although I have authorized Mr. Symons to arrange this matter with yourself.

With best regards, I beg to remain,

Yours very truly,

Secretary.

It was conceded by the defendant that they had received possession of the real property in question, which was covered by the agreement between Shuman and Springe, on the 4th day of June, 1908, [112]

Testimony of E. P. Vandercook, for Plaintiff.

E. P. VANDERCOOK, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is E. P. Vandercook. I was dealing principally in real estate in the years 1906, 1907, and 1908. I am familiar with and had dealings or transactions in real property situated about the borders of Clear Lake in the years 1906, 1907 and 1908. I commenced to deal in real estate in 1886 and followed it very closely until 1908, very closely; in fact it was my principal business during those years. I have bought and sold real estate in Alameda County, city of Oakland, in Lake County and various other counties of the State of California. I have negotiated transactions that have involved very large sums of money and I have had a great many small transactions as well. I have acted as expert for the City of Oakland in its water litigation and also for the railroad commission on the question of land values.

I have been familiar since the early part of 1905 or the latter part of 1904 with the property known

(Testimony of E. P. Vandercook.)

as the Heinz Springe property, which is concerned in this litigation. I am familiar with the improvements that were placed on this property in the year 1907, or thereabouts, by J. Dalzell Brown. I saw these improvements in the years 1907 and 1908, after the work upon the property by Brown had ceased. I am familiar with land values in Lake County on or about the 4th day of June, 1908. The improvements placed upon the Heinz Springe property by J. Dalzell Brown added more to the value of this land than their actual cost. I would say, in dollars and cents, that the improvements added approximately $60,000 to the value of the property.

In the early part of 1907 I was a stockholder in and actively engaged in securing properties around Clear Lake for the Central Counties Land Company, and in the latter part of 1907 I was appointed manager of the corporation. I held this position **[113]** in December, 1907, down to and including the 4th day of June, 1908. I recall the circumstances under which two options were obtained from J. Dalzell Brown for the purchase by the Central Counties Land Company of the property here in question. They were obtained at my suggestion and instigation. Although one of the options is dated at an earlier date—September, I think it is—both were actually made in December, 1907.

Cross-examination.

I have a little stock in the plaintiff corporation at this time, although I hold no office therein.

(Testimony of E. P. Vandercook.)

As I have said, the so-called Brown mansion on this property added about $60,000 to its value. It was a concrete and rubble, or stone and concrete, house of Spanish style, with an open patio in front enclosing a large oak tree. It was for residential and social purposes very largely. It was not a farm house. It was a villa capable of being used at all times of the year. The ranch where the mansion is situated has been used mostly for stock-raising. There is a vineyard of some extent, approximately sixty or eighty acres, a little orchard, and some general farming, but the ranch is used chiefly for stock-raising. Nevertheless I believe that a summer villa of this millionaire type of mansion added $60,000 to the property for the following reason: There was no building or improvements on the lake that was comparable to it in any way. It aroused great interest in that section of the county. It was something that we in our work in connection with the Central Counties Land Company had been very anxious to have there, in looking forward to the time when we would be able to consummate our plans and subdivide the properties around the lake. We were very anxious to attract capital.

I have not been there for three or four years, but at the time that work was stopped I understood it was within about $3,000 **[114]** of being completed. It was practically completed during 1907, but it has not led to similar improvements in that vicinity of any consequence. "The improvements I have not in mind at the present time, but" it was

(Testimony of E. P. Vandercook.)

a very large structure of two stories and must have had something like twenty-five or possibly thirty rooms. It was intended for entertainment and home life—sociability. It was very cleverly and completely designed and very highly estimated by everybody that examined it, as far as my personal contact with it went. It had a tile roof, hardwood floors generally throughout, and, I think, some maple downstairs.

Lakeport is 19 miles by the shortest wagon road, but by the ordinary stage road it is something like 24 miles. This mansion is, perhaps, in an air line, about 7 miles across the lake from Lakeport. If they utilized the bridge which the company built across from Rodman's Point to the Springe Ranch, the distance would be, perhaps, a little over 30 miles from the ranch to the railroad. In the winter time what was called the Lake Road was practically impassable. That was a road which for a part of the distance ran right along the lake shore and it was generally in the winter season overflooded by the high water of the lake. At that time it was necessary to make a detour and go around by Upper Lake. The roads were rather poor at that time; from Upper Lake to the ranch the roads were in fair condition. At the time we had the toll-road we kept it in very passable condition and at other times it has been very rough. I have never known of the toll-road being closed, nor have I known of its being closed while I was connected with the matter except when some

slide would occur which would temporarily block traffic.

The house built by J. Dalzell Brown was intended by him for his own use. There are not many inhabitants in all Lake County; that is one of its charms; but this particular spot where [115] this house was located is a very beautifully timbered and very attractive spot; one of the most attractive places on the lake. The mansion is quite near—I suppose within five hundred or six hundred yards—of the easterly line of the ranch, where the next ranch comes in. Ranches are scattered along there. There are some four or five ranches between the Springe and the Gopcevic Ranch, which is the old Floyd place. The Brown place is on the northerly side of the Lake, generally speaking. As you look from Lakeport, it is a little to the south. We refer to it ordinarily as the north portion of the lake. Lakeport is located on the westerly side and toward the northerly end. You would have to go around the northerly end of the lake to pass the Brown place; in other words, northeasterly from Lakeport, unless you crossed the bridge which I have already mentioned. If you go around the end of the lake, the Brown place is about 10 or 11 miles from Lakeport. The bridge is a wagon bridge of frame construction, built on pilings. It is not concrete. The last time I looked at it it was said to be in good condition. I have not been there for three or four years.

The inhabitants in the immediate vicinity of the mansion are principally engaged in farming or fruit-

(Testimony of E. P. Vandercook.)

raising. Its location might be stated as being in the vicinity of Mr. Hammond's place, and Edmonds, his brother-in-law. They are situated in the rear and north of this property. There are people of ostensibly some means and wealth in the immediate vicinity of the property. Their dwellings are very fair, frame structures. They did not, however, cost anything like $45,000 or $60,000. Mr. Hammond's place, however, must have cost about $8,000. I base my opinion to the effect that the Brown place added $60,000 in value to the land upon the following grounds: In the great amount of attention which it directed toward that property. The fact that it made that property very much more salable. We [116] had offers at the time of the construction of this house of some rather fabulous prices for land in the vicinity of the Brown place; we were not at that time in a position to sell anything because we still had other properties to acquire, but we have been offered as high as $50 a front foot for some of the coves and shore reaches of the lake. The only way I can judge of the actual result is from the fact that there was at that time quiet an activity, quite a desire on the part of several people to acquire villa sites on the lake. If at that time we had been in a position to sell or take advantage of the prices offered for various lands in which the company was interested, we could have given a permanent value to the property around Clear Lake. We were offered as high as $50 a front foot in the immediate vicinity, but we could not take advantage of such offers be-

cause we had quite a lot of property to acquire yet on the lake and we would simply be bidding against ourselves as a matter of business if we sold for $50 a foot and bought it at $2.50.

Mr. Brown, I might say, never had in excess of a one-fifth interest in the Central Counties Land Company. We had acquired at that time about 70 or 75 per cent, of the margin of the lake. We were engaged in negotiations for other pieces, various other parcels of land, and of course we assumed, and I think correctly so, that if we sold anything at these largely enhanced prices that it would operate against us in acquiring by purchase the rest of the property. We all believed it was proper. While it is true in a sense that it was a policy inimical to the company's interest to put these improvements on there, provided Brown could have foreseen that the value of the property would thereby be raised, nevertheless we were preparing to make a very large real estate operation of Clear Lake and we were trying to interest the rich class of people, the people who had the money to spend, in this development, and this seemed to us a very necessary [117] step; that is, we were very glad when Mr. Brown made up his mind to build the house. The improvement was Mr. Brown's own private enterprise.

The Central Counties Land Company built the bridge. Its object was to reach more readily properties on the easterly side of the lake, cutting off a detour around the Upper Lake district, I think, of 12 miles.

(Testimony of E. P. Vandercook.)

I don't think the building of this mansion on the property enhanced the value of this farm as a stock ranch. While it was used at that time principally for stock-raising, I do not say, however, that that was the only value it had. I consummated several of the deals which were undertaken at this time.

Mr. HENSHALL.—Isn't it a fact that the scheme then was to appropriate all the land in that vicinity, and that by lack of funds you were not able to make the purchase?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT.—It seems to me it is involved in the subject matter of this witness' examination, because he has laid before the jury his judgment as to the results flowing from this particular improvement, and the jury, among other tests, have a right, in determining what weight they will accord to his evidence, to know the general effect on his mind of what they had in contemplation in making up his estimate as to what these improvements added as value to that land. I think in that respect that the inquiry is a pertinent one.

Mr. WHEELER.—I will reserve an exception.

(Plaintiff's exception No. 1.)

A. We were certainly very much hampered for funds at certain times. We had quite a large asset in the way of clear property which we were able to borrow money on at times, and to carry payments [118] along on other lands. As late as 1910, nearly all of the optional contracts which we took upon the

lake, were either in existence or had been revived, and we owned in fee, roughly speaking, I do not like to give figures without consulting the books, but property to the value of about $400,000.

The COURT.—In cost?

A. In cost. That is approximate; I would like to verify that statement by looking over the accounts. There is no question about it, it was pretty hard sledding; we did the best we could; we wanted to control the absolute situation around Clear Lake.

Mr. HENSHALL.—Q. Isn't it a fact that you intended to raise the water level many feet, and then have villas all around the lake?

A. We intended to conserve the water at a certain limit; ordinarily, that limit is supposed to be at 10 feet above the government low-water mark; that is a mark established by the government at the low-water stage. We assumed and argued that the holding of the water at the 10-foot level would increase the beauty and attractiveness of the lake, because it covered all the marshy spots; there were some 4,000 acres of swamp and overflowed land around Clear Lake, and if the water was held up, these spots would not become an eye-sore; when the water was out, they become offensive to the eye and were not attractive.

Q. If the water level were raised, how would that affect Mr. Springe's land, do you know?

A. Up to the 10-foot level it would not affect it harmfully in any way, in my judgment.

Q. Wouldn't it, as a matter of fact, Mr. Vander-

(Testimony of E. P. Vandercook.)

cook, flood about 300 acres of land, very valuable land?

A. I don't think it would flood anything that was not affected every winter.

Q. You do not? A. I do not.

Q. Do you know that to be a fact?

A. Well, that is my judgment; we have the surveys of the entire region; we can tell [119] exactly how that matter stands; we have contour maps of the lake.

Q. It is a fact, is it not, that this scheme that you have referred to was never consummated?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—It is only admissible on the question of this witness' valuation. I do think it has a bearing upon that, as to whether or not an isolated improvement of the character which has been described could have added the value that the witness has stated to that particular property. I think in that regard that it is relevant and pertinent.

Mr. WHEELER.—I add to my objection that it is not cross-examination, and save an exception.

(Plaintiff's exception No. 2.)

The COURT.—The scheme has never been carried out?

A. No, not completely so; some portions of it are in process, that is, some of the allied interests are in process of consummation, but the real estate plan was abandoned after some years.

Mr. HENSHALL.—Q. Do you know whether that

(Testimony of E. P. Vandercook.)
bridge was ever dedicated to the public?

A. It was not while I had anything to do with it.

Q. And it has not been since, so far as you know?

A. Not so far as I know.

Q. By the way, was that house not built specifically for J. Dalzell Brown's personal use?

A. I think it was.

Q. Did you know the character of the improvements on that ranch at the time that building was put up?

A. Very plain, small house and barn, very inexpensive improvements at that time.

Q. Inexpensive? A. Inexpensive.

Redirect Examination.

In using the pronoun "we" as I have used it, I mean the Central Counties Land Company. In that company Brown had nearly a one-fifth interest. There were various other parties interested; [120] the Capay Ditch Company, of Woodland; Mr. George D. Gray; Mr. Archibald C. Kain, and a Mrs. Newton; Jose Costa; George M. Perine, and Anson Blake. George M. Perine became interested sometime in 1908; he was not one of the original men with us. All of these parties put up money in this corporation.

The Hammond place adjoined the property on the north line. Mr. Edmonds is Mr. Hammond's brother-in-law, whose ranch adjoins Hammond's ranch, a little further north. I do not know what their homes actually cost; I simply approximated it. Mr. Rodman had a place on the Upper Lake basin, right

(Testimony of E. P. Vandercook.)

at the end of the bridge on the Lakeport side. Mr. Rodman's bungalow, I would call it, was not very pretentious; a very neat place, and attractive. The Collier place is a villa site near there. Collier built a rather expensive house there a few years ago; it was a frame structure, but a very attractive house; probably cost $15,000. The Floyd place is now known by the name of the Gopcevic place. It is attractive. The house, of course, is very old, built after the ideas of Captain Floyd. It resembles the deck of a ship—built in that style. I should imagine that the house probably cost in the neighborhood of $20,000 when it was built. Various persons have homes on the lake who own boat landings and launches and yachts—good boats. The Brown place had a very good boat landing, constructed as a part of the improvement. There were various villa sites and homes about the lake in addition to the Brown place; approximately 6% of the lake was suitable for villa sites. Approximately 150 acres of the Brown place in the immediate vicinity of the Brown house were suitable for villa sites. There were clumps of foliage and trees at various places. I have never estimated the acreage carefully. I did have in mind the subdivision and sale of the property.

With reference to the enhanced value of the place, it [121] was not confined simply to the spot upon which the house was located and the surrounding grounds; indeed, the value applied to the entire property. It was our plan at that time to cut up a large part of the Springe ranch into small farms. When

(Testimony of E. P. Vandercook.)

I use "our plan," I mean the plan of the Central Counties Land Company. They do not own the ranch, but Mr. Brown, as you noted, gave us an option to take the property after he got in trouble. It was not our ranch when this building was put up there.

With reference to the purchase of the property, pending this action of ejectment, I made an offer to purchase this property from Mr. Springe. He gave me a price, through Mr. Wheeler, as my attorney, upon the property. The document which you have shown me dated March 4, 1908, states the price which Mr. Springe named.

Plaintiff then offered in evidence letter dated March 4th, 1908. Counsel for defendant admitted that the signature of Galpin, Elkins & Frost, as the agent of the defendant, was subscribed to this letter. This letter admitted in evidence and marked Plaintiff's Exhibit 16, and is in words and figures as follows:

Plaintiff's Exhibit No. 16—Letter, March 4, 1908, Galpin, Elkins & Frost to Wheeler.

"(Letterhead of Galpin, Elkins & Frost, 110 Sutter Street, San Francisco.)

"March 4, 1908.

Chas. S. Wheeler, Esq.,
Union Trust Bldg.,
San Francisco, Cal.

Dear Sir:

We are instructed by Mr. Heinz Springe to advise you that he is willing to sell to Central Counties

Land Company his certain real property situate in Lake County, Cal., which he contracted to sell to L. J. Shuman in that certain contract, in writing, between said Springe and said Shuman of date September 9, 1906, described as follows:

NE. ¼; SE. ¼; SE. ¼ of NW. ¼ and NE. ¼ of SW. ¼ of Section 21;

S. ½ of Section 22;

SW. ¼ of SW. ¼ of Section 23;

NW. ¼; SW. ¼ of NE. ¼ and fractional N. ½ of SW. ¼ of Section 26; [122]

Fractional N. ½ of Section 27;

Fractional N. ½ of Section 28;

Fractional E. ½ of Section 29, lying east of slough;

All in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Also that certain tract of land situate in the County of Lake, State of California, and being lots 3, 4, 9 and 12 of Section 6, Township 15 North, Range 8 West, M. D. M., containing about 178 acres of land.

It is to be understood that Mr. Springe reserves, and does not include in the property hereby offered for sale, the following described real property, to wit:

SW. ¼ of NE. ¼, E. ½ of NW. ¼, Lot 2, E. ½ of SW. ¼ of NW. ¼, and also a part of Lot 1, commencing at the northeast corner thereof, running thence west 10 chains, thence south to the meander line of Clear Lake, thence southeasterly along said meander line to the southeast corner of said Lot 1, and thence north to the place of beginning;

All situate in Lake County, Cal., in Section 26,

Township 15 North, Range 9 West, M. D. M.

The terms on which Mr. Springe will sell said property are as follows:

Proposition 1.

Sale price $75,000.00 of which $30,000.00 to be paid in cash within one week from date hereof;

The remaining sum of $45,000.00 to be paid within 30 days hereafter;

Interest on deferred payment at 6½% net per annum.

Proposition 2.

Terms of sale $100,000.00, payable as follows:

$25,000.00 cash to be paid within 90 days from date hereof;

The remaining sum of $75,000.00 to be paid on or before 5 years from date hereof;

Possession to be given to Central Counties Land Company, as tenant only, upon signing of contract of sale and purchase, and of signing the lease of property;

A cash rental equivalent to 6½% net on deferred payments to be charged from date of signing contract of sale until fully paid;

Rental to be stated in contract of sale as a sum definite per month, and to be so named in lease of premises;

Rental to be payable quarterly in advance.

In addition to the sale price herein named in the two propositions above, Central Counties Land Company must pay all labor and materialmen's liens now on the property offered for sale, or which may hereafter be placed on said property, for debts or obliga-

tions incurred by J. Dalzell Brown, or his representatives or agents. Central Counties Land Company also to pay all taxes now a lien on the property, also all taxes which may be levied on the property during the term of any contract or option to sell given by Mr. Springe; also to keep residence built by J. Dalzell [123] Brown, and boat house, insured for Springe's benefit to amount of $25,000.00.

It is to be understood that time is to be of the essence of all terms and conditions expressed in contract of sale, and that in default of performance of any such conditions or terms Mr. Springe will be entitled to immediate possession of the property, and all rights of purchaser under contract will immediately cease and terminate.

It is to be understood, as a condition precedent to executing a contract of sale upon either of the terms hereinabove made, that the suit instituted by Central Counties Land Company against J. Dalzell Brown and Heinz Springe, in the City and County of San Francisco, shall be dismissed, and in the ejectment suit instituted by Heinz Springe against J. Dalzell Brown and others, at Lakeport, Cal., trial shall be had and a decree rendered in favor of the plaintiff, for the possession of the property.

We think this last necessary in order to eliminate Mr. Brown as a factor in the transaction.

Mr. Springe is willing to give such title to the above property offered for sale as he had at the time he tendered a deed to the property to J. Dalzell Brown in 1907, and which title, as we are advised,

was passed as good by Messrs. Gray & Cooper, attorneys for Brown.

In the event Central Counties Land Company is unable to accept Mr. Springe's first proposition, by reason of not having sufficient funds, but is willing to accept the terms expressed in his second proposition, Mr. Springe is willing to advance sufficient moneys to pay off the labor liens now on his property, or which may hereafter be filed and incurred by J. Dalzell Brown and others, on condition that he be repaid said moneys so advanced within a reasonable time, with interest.

The terms of sale herein made to Central Counties Land Company by Mr. Springe are open for acceptance by Central Counties Land Company until 12 o'clock M., Saturday, March 7th, 1908, by which time we shall hope to hear from you.

Yours truly,

(Sgd.) GALPIN, ELKINS & FROST."

I know approximately the location of the property secondly described in Plaintiff's Exhibit 16. I should say that it was of very little value; it is quite detached from the main ranch. The value of that property, in my opinion, on the 4th day of June, 1908, was about $2.50 per acre.

The Springe ranch had nearly 4 miles frontage on the lake. There was no written agreement with Brown whereby the Central Counties Land Company or the California Industrial Company should have this property. Originally the Central Counties Land Company undertook to acquire the property and to put up the [124] preliminary deposit in

(Testimony of E. P. Vandercook.)

the hands of Mr. Shuman; following that our procedure was ordinarily to have the land conveyed to the California Industrial Company, this company in turn conveying everything except the overflowage right to the Central Counties Land Company, retaining in itself the overflowage right. About that time Mr. Brown became interested in the property and wanted to take it over, and agreed verbally that after he had determined upon the acreage which he desired to hold as the home place, he would turn the balance of the land back to the Central Counties Land Company at a price to be agreed upon between us.

Recross-examination.

Mr. HENSHALL.—Q. You have spoken, I think, of certain options that were given by Mr. Brown to the Central Counties Land Company. You know of these options, do you not? A. Yes.

Q. I ask you if the Central Counties Land Company ever went into possession of the property covered by those options?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent and not cross-examination.

The COURT.—What is the purpose of that?

Mr. HENSHALL.—I want to show, probably it will be admitted by counsel to be the fact, that this witness testified to the existence of these options, and they acted under the options, and that Brown put the Central Counties Land Company in the possession of this property, which was a portion of this

(Testimony of E. P. Vandercook.)

property to be sold to Brown; that was pending the litigation, and after the complaint was filed in the ejectment suit.

The COURT.—I will let the question be answered.

Mr. WHEELER.—Exception.

(Plaintiff's exception No. 4.)

A. I don't think I could answer that question accurately. My general recollection is that for a time we had a man by the [125] name of Simmons looking after the property for us, but to what period in the matter I could not place at the present moment.

The following colloquy then took place:

Mr. WHEELER.—It is alleged, if your Honor please, in paragraph 7 of the amended complaint, "That pursuant to the terms of said agreement, said Brown, on or about the 15th day of December, 1906, entered into possession of the premises mentioned in said agreement; that between said 15th day of December, 1906, and the 18th day of December, 1907, said Brown, with the knowledge and consent of said defendant, made and constructed valuable improvements upon said premises, and prior to the 18th day of December, 1907, had expended in making said improvements the sum of $40,000."

"Defendant has no information or belief upon the subject sufficient to enable him to answer the allegations in plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that prior to the 18th day of December, 1907,

or at any time or at all, one J. Dalzell Brown had expended in making improvements upon the premises referred to in Plaintiff's Amended Complaint on file herein, and described in Exhibit "A" to plaintiff's said complaint, the sum of $40,000, or any sum in excess of $30,000."

We accept the admission that $30,000 was so expended, that representing the cash payment.

With regard to the expenditures for which mechanics' liens were filed, will it be admitted that they amounted to $15,000?

Mr. ELKINS.—It was not that much.

Mr. WHEELER.—What is the total of the liens filed?

Mr. ELKINS.—We have corrected the amount, and the amount is $9,358, and we paid in settlement of this $7,540.

Mr. WHEELER.—The allegation in your answer of course was [126] that it was $15,000. However you are satisfied with the figures, are you?

Mr. ELKINS.—Yes.

Mr. WHEELER.—You will admit, then, that the amount of the liens was actually how much?

Mr. ELKINS.—$9,358. The amount paid by Mr. Springe in satisfaction of the liens was $7,540.

Mr. WHEELER.—But the liens were believed by you at the time you filed your answer to be $15,000, as sworn to by Mr. Springe.

Mr. ELKINS.—I will state, Mr. Wheeler, that there were other claims, that is, suits were filed against Mr. Brown; they neglected to file their liens

in time; one was $3,500 and there were one or two others.

Mr. WHEELER.—Were those amounts expended on the property?

Mr. ELKINS.—On the property, but no liens filed.

Mr. WHEELER.—Did they total the $15,000?

Mr. ELKINS.—Yes, about.

Mr. WHEELER.—That will stand admitted, there were liens filed only for the amount you have indicated?

Mr. ELKINS.—Yes.

Mr. WHEELER.—You allege that there was a demand for surrender of possession—on what date do you claim it was made? I notice some conflict apparently in that.

Mr. HENSHALL.—Where is the allegation that you want admitted in that regard?

Mr. WHEELER.—It is alleged that you made demand upon the same date that you filed your ejectment suit, and yet I notice in the ejectment suit that there is a claim that the demand was made on the 30th of October, 1907, while your ejectment suit was not filed until the month of January, 1908.

Mr. ELKINS.—I have not my memoranda here, but it was not on [127] that date, it was not until January that the demand was made.

Mr. WHEELER.—On the day that the suit was brought, that is the allegation.

Mr. ELKINS.—I think it was the 13th or 14th of January; the suit was filed on the 15th of January, as I recall.

Mr. WHEELER.—That will stand admitted, that on the 14th or 15th of January, demand was made for the possession of the premises and the ejectment suit was filed at that time?

The COURT.—Who was in possession at that time?

Mr. WHEELER.—The Central Counties Land Company had taken possession under Brown. It will be admitted by me, if the gentlemen have no objection, that it was after a *lis pendens* filed in the ejectment suit.

Mr. ELKINS.—I do not understand that. The last deed was tendered to Mr. Brown at the county jail, No. 54–64 Eddy Street, on December 17, 1907, and he remained in possession up till January, and then demand was made by Mr. Springe, the plaintiff, of Mr. Simmons, in charge of the property, that Mr. Simmons refused to deliver possession; then demand was later made on Mr. Brown in San Francisco in January, he still refused to give up possession, and then suit was brought.

Mr. WHEELER.—Can you give us the date on which the demand was made on Simmons and Brown?

Mr. ELKINS.—I have not it right here.

Mr. WHEELER.—Have you it approximately?

Mr. ELKINS.—Approximately. After Mr. Springe arrived here from Europe sometime in January, he and Mr. Frost went to Lakeport and made demand on Mr. Simmons for possession; the demand was refused, and Springe returned to San Francisco, and on January 14, or 15, I on behalf

of Mr. Springe, went out to the county jail and demanded possession of Mr. Brown, and he refused possession.

Mr. WHEELER.—That will stand admitted. With that we rest, then. [128]

Thereupon the defendant, through his counsel, moved for a nonsuit upon the grounds following, to wit:

1st. Upon the ground that there was no allegation in the complaint and no proof offered at the trial that the plaintiff had ever offered to restore, or had ever restored, any portion of the personalty or the proceeds thereof constituting a part of the consideration received by the assignor of the plaintiff pursuant to said sales contract entered into between one Shuman and the defendant, under the terms of which the plaintiff now seeks to recover.

2nd. Upon the ground that there was no proof upon the trial that the plaintiff, or his assignor, ever returned, or offered to return, to the defendant the real property of the defendant described in the said sales contract from the defendant to said Shuman—except that the assignor of the plaintiff surrendered the possession of said real property to the defendant subsequent to and pursuant to the judgment of the Court in the ejectment suit brought by the defendant Springe against J. Dalzell Brown, the assignor of the plaintiff, to recover possession of said real property.

3rd. Upon the ground that it appears from the proof adduced upon this trial that J. Dalzell Brown, the assignor of plaintiff, pursuant to said sales con-

tract, after full notice and knowledge of any defects in plaintiff's title to the lands described in said contract, elected to purchase said lands pursuant to said contract, and did specifically waive any and all possible defects in the title to the lands described in said contract.

4th. Upon the ground that it appears from the proof adduced upon this trial that the said J. Dalzell Brown, the assignor of the plaintiff, did not at any time rescind or offer to rescind such sales contract pursuant to the terms of which the plaintiff seeks to recover herein. But, on the contrary, it appears from such proof that J. Dalzell Brown, the assignor of the plaintiff, at all times [129] elected to purchase the lands of the defendants, notwithstanding any possible defects in the title thereto, at the price and upon the terms set forth in said sales contract, and that said J. Dalzell Brown failed to make such purchase for the sole reason that he was unable to obtain moneys with which to make such purchase.

5th. Upon the ground that the right to rescind said sales contract and to recover back from the defendant any of the moneys paid thereunder was waived by the allegations and admissions contained in the answer of J. Dalzell Brown, the assignor of the plaintiff in the said action in ejectment brought by the defendant, Heinz Springe, against said Brown, et al., to recover possession of the real property described in said sales contract; and by the conduct of the said J. Dalzell Brown, the assignor of the plaintiff, in making a defense to the said eject-

ment suit brought by the defendant herein to recover possession of said lands.

6th. Upon the ground that it appears from the proof adduced upon the trial in this action that upon demand made by the defendant herein upon the said J. Dalzell Brown, assignor of the plaintiff, for the delivery to the defendant herein, of the real property described in said sales contract, the said Brown failed and refused to surrender said lands; but, on the contrary, at all times, to and including the entry of judgment in said ejectment suit by the said Heinz Springe against the said J. Dalzell Brown, the said Brown retained possession of said lands to himself and his assignees and asserted his right of possession of said lands and to purchase the same pursuant to said sales contract, and that the said J. Dalzell Brown thereby waived all rights whatsoever he at any time might have had to rescind said contract to purchase said lands.

7th. Upon the ground that it affirmatively appears from the proof adduced upon the trial herein that there was at no time any mutual rescission of the said sales contract; but, on the contrary, defendant Springe herein has at all times stood upon his said contract, [130] asserted his rights thereunder, and has at no time offered to rescind, or did rescind said sales contract.

8th. Upon the ground that the judgment and decree of the Superior Court of the State of California in and for the County of Lake in said ejectment suit entitled, Heinz Springe vs. J. Dalzell Brown, et al., same being Lake County Superior

Court action No. 1789, which judgment was in favor of the defendant, Springe, herein and against the said J. Dalzell Brown, assignor of the plaintiff, was and is *res adjudicata* upon all the questions involved in this action, and that by reason of such judgment the plaintiff herein is estopped from asserting in this action that there was any recission of said sales contract, or that the defendant herein did not have a good, merchantable title to the real property described in said contract, or that the defendant herein was at any time in default in the performance of any terms or conditions of said sales contract; and also estopped from asserting that the plaintiff herein or his said assignor, J. Dalzell Brown, did not commit a breach of said contract of purchase, or was not in default in making payments due pursuant to said contract, or by reason of such default did not forfeit all rights in and to said sales contract and in and to all moneys paid or expended in pursuance thereof.

9th. Upon the ground that it appears from the proof adduced upon the trial herein that J. Dalzell Brown, the assignor of the plaintiff, remained in possession of the lands described in said sales contract after he knew of the defective title thereto, and after demand had been made upon him to surrender said lands to the defendants herein, and that thereby said J. Dalzell Brown waived any and all objections to any defects in the title to said property, and waived any defects in the title contracted to be conveyed to him.

10th. Upon the ground that the allegations of the Complaint were not established by the evidence in-

troduced upon the trial herein, and that a variance exists between the said allegations and the proof on the trial. [131]

After arguments of counsel on defendant's motion for nonsuit, the following proceedings were had:

The COURT.—(Orally.) I have not had a very full opportunity to review what you have handed me just now, Mr. Wheeler. I see that it is in accord with what you have just been suggesting.

Mr. WHEELER.—Yes, your Honor.

The COURT.—I have listened to the arguments with a great deal of attention, because they have been illuminating; but as a result I am unable to withdraw my mind from the attitude which has been perhaps sufficiently indicated through the argument, that the judgment in this action in ejectment, by reason of the issues that were raised by the parties, is a conclusive adjudication upon the plaintiff here.

Let us see. The rule is aptly stated by Mr. Freeman in his very excellent work on judgments as to what is concluded by such an adjudication, "An adjudication," says Mr. Freeman, "is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties might have litigated, and have decided as incidental to or connected with the subject matter of litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and of defense. * * *

"The defendant must bring forward all the defenses which he had to the cause of action asserted

in the plaintiff's pleadings at the time the action was commenced."

And again: "To render a matter *res judicata,* it is not essential that it should have been distinctly and specificially put in issue by the pleadings."

Now, in this case, we have this situation. Here was this contract of sale and purchase. Under its terms the purchaser was put in possession. He made the first payments, and it came down to the point of final payment. He failed to pay under circumstances which, in the judgment of the plaintiff to the action constituted a breach, whereupon by a course thoroughly well [132] established as to the rights of the parties under such circumstances, he brought his action in ejectment to oust the purchased. While that action, independently considered, did not essentially involve the contract, in this instance it was based upon the contract because, necessarily, the plaintiff in the action could not recover unless he established a breach by the defendant under that contract.

It may be conceded, as has been suggested, that, had Mr. Brown seen fit to refuse to appear, or had simply put in a negative defense and let judgment go,—I am willing to concede that the judgment would have concluded nothing except the question as to the right of possession. But he did not do that. He saw fit not only to interpose his negative response to the title of the plaintiff, but he set forth his supposed rights under this contract whereby he sought to establish the fact that he was holding within its terms. When he did that, he submitted

the entire controversy, not only as based upon what was in those pleadings, but whatever he might have stated in the way of defensive matter to show that he was not in default under that contract. We took the ground in his defense to that action that the plaintiff was not entitled to recover because, notwithstanding the last payment had not been made in accordance with the terms of the contract,—which he admitted to be then due and payable—that the plaintiff had failed to tender to him a deed which would carry a merchantable title. He stood upon that defense, and it was adjudged against him. Now, mind you, if he had a good defense in connection therewith which would have shown to the court that in fact, by reason of the subsequent agreement between the parties, time as the essence of the contract had been waived as to the payment which remained to be made, and that no subsequent notice had been given him, and that, therefore, he was not in default in that last payment, unquestionably the judgment must of necessity, had the fact so found, gone in [133] his favor, because that would have shown that the action in ejectment was premature; that the plaintiff in fact had no cause of action, because of the existence of this contract, and which, supplemented by the subsequent arrangement between the parties, would have shown that the last payment was not in fact due, and that, therefore, as the matter then stood, Mr. Brown was rightly in possession until such time as he was put by proper notice to the necessity of meeting the last payment; and that, of course, would have rested

upon the tender to him of a proper deed conveying title. He did not do that. He rested upon the defense that I have indicated. Now, under the rule that I have stated as to what is included in a judgment under such issues it seems to me that that was his own fault. If he had such a defense as is now claimed, he should have pleaded it in his answer, in accordance with the facts; and if sustained, he would undoubtedly have prevailed. He failed to do that. He set up a state of facts at variance indeed with what his assignee now claims to have been the real facts of the transaction. But the whole controversy was submitted to the court under those pleadings. The fact that there was the defect in Brown's defense as the evidence now would tend to disclose, could make no difference. The question that was in issue in that case,—and carrying with it everything essential to a judgment upon the issues,—was the question of possession. And when the court determined under the issues that were there presented that the defendant was in default under this contract, and that, therefore, the plaintiff was entitled to possession, it necessarily included a finding of everything which the defendant might have set up in that connection which would have tended to a different conclusion. That is the case as it presents itself to my mind, and I am unable to see my way clear to avoid the conclusion that results from it. [134]

I am exceedingly loath always to take a case from the jury up what, in common parlance, might be termed a technical objection rather than upon the

merits, but the law contemplates that the plaintiff must make out a case which entitles him to go to the jury before the issues can be submitted to them.

Mr. WHEELER.—I do not wish to interrupt your Honor, but there is one matter which I think I should suggest. It seems to me that this proposition has escaped the attention of the court,—that what the court says might well be correct provided facts sufficient to constitute a defense had been pleaded, but there were not facts stated.

The COURT.—What I am saying necessarily includes that consideration. I have covered it by saying that it was involved in what he did plead, because, having rested his defense upon the contract, he was bound to bring forward everything in the nature of a defense which he had thereunder.

Mr. WHEELER.—My suggestion is that pleading no defense is like filing no answer at all, and is equivalent to a default.

The COURT.—I understand your position perfectly, but it does not accord with my judgment as to what was pleaded there and concluded by the judgment, because, as I have suggested, and as stated by Mr. Freeman, it concludes the parties not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or connected with the subject matter of litigation. The defendant must bring forward all the defenses which he has to the cause of action.

Mr. WHEELER.—I understand that, but I insist that is not the rule that is applicable—

The COURT.—Yes. Now, as I say, I hesitate to take a case from the jury, but it is my duty, if a case is not made. It is a question of law whether a *prima facie* case is made, and it is [135] as much my duty to do that as it would be to submit the case to the jury if that situation did not present itself. But, however, estoppel by judgment is not a harsh rule. The doctrine of estoppel by judgment is one of the most beneficent rules that has grown out of our system of jurisprudence. Why? Because it makes for peace and quiet, and the termination of litigation. Therefore, when it can be seen that the party has had his day in court in order to present that which would constitute a right, and has permitted it to go against him because of his failure to properly set it up, he cannot thereafter complain; he cannot have, as was suggested this morning, "two bites at the cherry."

Now, in the view I take of it that is precisely what is presented here under this state of facts, and accordingly the motion for nonsuit will be granted.

Mr. WHEELER.—Will you allow us the benefit of an exception?

The COURT.—Yes.

(Plaintiff's exception No. 5.)

That thereafter, on the 22d day of June, 1916, the Court caused to be made and entered in the above-entitled cause the following minute order:

> "The parties and the jury being present as heretofore, the trial was resumed by the further arguments of counsel, at the conclusion of which the motion was submitted and being fully considered it was ordered that said motion be and

the same is hereby granted, to which ruling the plaintiff then and there duly excepted. Ordered that judgment be entered accordingly, with costs to the defendant, and that the jury be discharged."

That thereafter on the 22d day of June, 1916, the following judgment in the above-entitled cause was made and entered:

"JUDGMENT ON NONSUIT. This cause having come on regularly for trial on the 20th day of June, 1916, being a day in the March 1916 term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Charles S. Wheeler, Esq., appearing as attorney for the plaintiff and R. P. Henshall and Luther Elkins, Esqrs., appearing as attorneys for the defendant, and the trial having been proceeded with on the 21st and 22d days of June in said year and [136] term and evidence having been introduced on behalf of plaintiff and the attorneys for the defendant having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit, and the Court, after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and

the same is hereby entered against said plaintiff herein, that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs in this behalf expended taxed at $—.

Judgment entered June 22, 1916.

WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

That thereafter, by order of Court made and entered on the 30th day of June, 1916, said cause was continued over the term for the purposes of the settlement of plaintiff's bill of exceptions.

That thereafter, by order of Court made on the 30th day of June, 1916, an extension of time to and including July 12, 1916, was granted to plaintiff within which to prepare and serve his proposed bill of exceptions.

That thereafter, by order of Court based on the stipulation of counsel made on the 10th day of July, 1916, plaintiff was granted an extension of ten days from and after July 12th, within which to prepare and serve his proposed bill of exceptions.

That thereafter, on the 19th day of July, 1916, by order of Court based on the stipulation of counsel, plaintiff was granted an extension of ten days from and after July 22d within which to prepare and serve his proposed bill of exceptions to be used in the prosecution of a writ of error from the judgment herein.

WHEREFORE said Power and Irrigation Company of Clear Lake, a corporation, plaintiff herein, presents this its said bill of exceptions and requests that the same be settled and allowed.

CHARLES S. WHEELER, and
JOHN F. BOWIE,
Attorneys for Plaintiff. **[137]**

Stipulation Re Settlement, etc., of Bill of Exceptions.

It is hereby stipulated that the foregoing bill of exceptions may be settled, allowed and certified by the Court as full, true and correct, and that the copies of papers introduced in evidence by plaintiff, which are attached as exhibits to defendant's answer herein, need not be set out in full, but may be incorporated herein by reference.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

Order Settling, etc., Bill of Exceptions.

I hereby certify that the foregoing bill of exceptions to be used on plaintiff's writ of error from the judgment herein is full, true and correct, and contains in substance all the evidence offered or received at the trial of the above-entitled action, together with all admissions of counsel, and that it was presented within the time required by law, and the same is hereby settled and allowed this 19th day of January, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed January 19, 1917. Walter B. Maling, Clerk. **[138]**

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Petition for Writ of Error.

To the Honorable Court Above Named:

Now comes Power and Irrigation Company of Clear Lake, a corporation, plaintiff in the above-entitled action, by Charles S. Wheeler, and John F. Bowie, its attorneys, and respectfully shows that on June 22, 1916 the court caused to be made and entered herein its Minute Order, wherein and whereby the said Court granted defendant's motion for a nonsuit in the above-entitled action and ordered that Judgment be entered accordingly with costs to the defendant; and upon said order so made as aforesaid a final judgment of nonsuit was entered on the 22d day of June, 1916, against your petitioner, Power & Irrigation Company of Clear Lake, a corporation, plaintiff above named.

Your petitioner feels itself aggrieved by said or-

der and judgment entered thereon as aforesaid and herewith petitions the court for an order allowing it to procure a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, under the laws of the United States in such cases made and provided. [139]

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue, that an appeal in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

Writ of error granted upon the foregoing petition upon the petitioner filing a bond in the sum of five hundred dollars ($500) to be conditioned as required by law.

Dated, August 16th, A. D. 1916.

WM. C. VAN FLEET,
Judge.

Due service and receipt of a copy of the within petition and order this 16th day of August 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 16, 1916. Walter B. Maling, Clerk. [140]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Assignment of Errors on Writ of Error.

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the judgment entered in the above-entitled cause on the 22d day of June, 1916, is erroneous and unjust to the plaintiff, and files with its petition for a writ of error the following assignment of errors, and specifies that the judgment is erroneous in each and every of the following particulars, viz.:

I.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff made out a complete case upon the first count of said complaint.

II.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff

made out a complete case upon the second count of said complaint.

III.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff made out a complete case upon the third count of said complaint. **[141]**

IV.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that the Court held that a certain judgment of ejectment rendered by the Superior Court in and for the county of Lake, State of California, in an action wherein defendant Heinz Springe was plaintiff and J. Dalzell Brown et al. were defendants operated as an estoppel and estopped the plaintiff in the case at bar from suing upon its claim.

The judgment of the Court in granting a nonsuit upon the said ground was erroneous, forasmuch as:

1. The said judgment was not an estoppel, in that it appears that the claim of plaintiff advanced in this action was not adjudicated in the said former action.

2. It appears on the face of the said proceedings in the said ejectment suit that the said Brown had entered into possession under a contract of purchase and sale; that the said Brown while in such possession and while admitting that the time for the final payment under said contract of purchase and sale had arrived was nevertheless neglecting and refusing to pay the same, basing his refusal upon the claim that said Springe's title was defective.

3. That upon the foregoing state of facts, plaintiff in said action in ejectment was entitled to a judgment restoring possession, regardless of any question of title in the said plaintiff, and the matters set up by the said Brown constituted no defense to the said action, and nothing was adjudicated in the said action other than that plaintiff was entitled to recover the possession of the said premises, and there was no adjudication upon the right of the said Brown to recover back amounts paid by him under said contract or the value of the improvements made by him upon the lands into the possession [142] of which he had entered under said contract.

Wherefore, plaintiff, prays that the said judgment be reversed, and that the District Court be directed to deny said motion for nonsuit, or that such other relief be awarded as the nature of the case may demand.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff.

Due service and receipt of a copy of the within assignment of errors this 16th day of August, 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 16, 1917. Walter B. Maling, Clerk. [143]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a Corporation),

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Power and Irrigation Company of Clear Lake, a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact surety business in the State of California, as surety, are held firmly bound unto Heinz Springe in the sum of Five Hundred and no/100 ($500.00) Dollars, lawful money of the United States, to be paid to him and to his executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 17th day of August, 1916.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has prosecuted a writ of error to the Circuit Court of Appeals of the United

States to reverse the judgment of the District Court of the United States for the Northern District of California in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said writ of error to effect and [144] answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Dated, August 17th, A. D. 1916.

[Seal Power & Irrigation Co.]

POWER AND IRRIGATION COMPANY OF CLEAR LAKE,

By H. S. ELLIOT, President,

By R. H. BORLAND, Secretary.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By JAMES W. MOYLES.

[Seal Hartford Accident & Indemnity Co.]

Approved August 17th, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 17, 1916. Walter B. Maling, Clerk. [145]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a Corporation),

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Prayer for Reversal.

To the Honorable, the Circuit Court of Appeals of the United States for the Ninth Circuit:

Comes now Power and Irrigation Company of Clear Lake, a corporation, plaintiff in error, and prays the court to reverse the judgment of the District Court of the United States for the Northern District of California, Second Division, made and entered in the above-entitled cause on the 22d day of June, 1916, and for such other and further relief as may be required from the nature of the cause.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Aug. 17, 1916. Walter B. Maling, Clerk. [146]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Praecipe for Transcript on Writ of Error.

To the Clerk of the Above-entitled Court:

Please make up, print, and issue in the above-entitled cause a certified transcript of the record upon a writ of error allowed in this cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Amended Complaint;

Answer;

Minute Order Granting Nonsuit;

Judgment of Nonsuit;

Bill of Exceptions;

Petition for Writ of Error, and Order endorsed thereon allowing same;

Assignment of Errors;

Writ of Error;

Citation on Writ of Error;

Bond on Appeal;

Praecipe for Transcript on Writ of Error.

You will please transmit to the Circuit Court of Appeals [147] for the Ninth Circuit, sitting at San Francisco, the said record when prepared, together with the original Citation herein.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 1, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [148]

In the Southern Division of the United District Court, in and for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred forty-eight (148) pages, numbered from 1 to 148, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the clerk of

said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $100.00; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of March, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the Northern District of California. [149]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in

the said District Court, before you, between Power and Irrigation Company of Clear Lake, a corporation, plaintiff in error, and Heinz Springe, defendant, in error, a manifest error has happened to the damage of said Power and Irrigation Company of Clear Lake, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the party aforesaid, in this behalf do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, State of California, where said court is sitting, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit [150] Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the law and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 17th day of August, 1916.

[Seal] WALTER B. MALING,

Clerk of the District Court of the United States, for the Northern District of California.

By————————

Deputy Clerk.

Allowed this 17th day of August, A. D. 1916.

WM. C. VAN FLEET,
Judge. [151]

[Endorsed]: No. 15,796. In the United States District Court for the Northern District of California. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Writ of Error. Filed Aug. 17, 1916. Walter B. Maling, Clerk.

Due service and receipt of a copy of the within writ of error this 17th day of August, 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant. [151½]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk. [152]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to HEINZ SPRINGE, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 15th day of September, A. D. 1916, being within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of California, wherein Power and Irrigation Company of Clear Lake, a corporation, is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 17th day of August, 1916.

WM. C. VAN FLEET,
Judge. [153]

[Endorsed]: No. 15,796. In the United States District Court for the Northern District of California (Second Division). Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Citation on Writ of Error. Filed Aug. 17, 1916. Walter B. Maling, Clerk.

Due service and receipt of a copy of the within Citation this 17th day of August, 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: No. 2956. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 20, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

No. ——

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant and Appellant.

Stipulation and Order Extending Time to and Including October 15, 1916, to File Record, etc.

It is hereby stipulated that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be enlarged and extended to and including the 15th day of October, 1916.

Dated at San Francisco, California, September 12, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake (a Corporation), Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and

File Record. Filed Sept. 13, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial District.

No. ——

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Stipulation and Order Extending Time to and Including November 15, 1916, to File Record, etc.

IT IS HEREBY STIPULATED AND AGREED that the time within which plaintiff in error shall docket the above-entitled cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be enlarged and extended to and including the 15th day of November, 1915.

Dated October 11th, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Power and Irrigation Company of Clear Lake (a Corpora-

tion), Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and File Record. Filed Oct. 11, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

No. ——

POWER AND IRRIGATION COMPANY, OF CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Stipulation and Order Extending Time to and Including December 15, 1916, to File Record, etc.

It is hereby stipulated and agreed that the time within which plaintiff in error shall docket the above-entitled cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be enlarged and extended to and including the 15th day of December, 1916.

Dated November 11th, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Power

and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and File Record. Filed Nov. 13, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

No. ——

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Stipulation and Order Extending Time to and Including January 2, 1917, to File Record, etc.

It is hereby stipulated and agreed that the time within which plaintiff in error shall docket the above-entitled cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be enlarged and extended to and including the 2d day of January, 1917.

Dated, December 11, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Power

and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and File Record. Filed Dec. 12, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

POWER & IRRIGATION COMPANY OF CLEAR LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Affidavit of Charles S. Wheeler, and Order Extending Time to and Including February 1, 1917, to File Record, etc.

State of California,
City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above-entitled action.

That said action was heretofore tried in the District Court of the United States for the Northern District of California, Division 2 thereof, and judgment was rendered for the defendant; that thereafter and within the time prescribed by law plaintiff perfected an appeal to the above-entitled court, and that the time within which plaintiff shall, under

the rules, docket said cause and file his record on appeal expires this day, January 2d, 1917; that a bill of exceptions is in process of settlement, that the proposed bill and proposed amendments thereto were handed to the Clerk of the United States District Court under the provisions of the rules of said court, on December 26th, 1916; that no date has yet been fixed for the settlement of said bill of exceptions by the said court, and that the record on appeal in this case cannot be prepared until said bill of exceptions has been settled.

Affiant further states that at least thirty days will be required before said bill of exceptions can be settled and engrossed and record prepared so that the above-entitled cause can be docketed and the record filed.

CHARLES S. WHEELER.

Subscribed and sworn to before me this 2d day of January, A. D. 1917.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended thirty (30) days from and after the date hereof.

Dated January 2d, A. D. 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Affidavit for Extension of Time to Docket Cause and File Record, and Order Extending Time. Filed Jan. 2, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

POWER & IRRIGATION COMPANY OF CLEAR LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Affidavit of Charles S. Wheeler, and Order Extending Time to and Including March 20, 1917, to File Record, etc.

State of California,
City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above-entitled action.

That said action was heretofore tried in the District Court of the United States for the Northern

District of California, Division 2 thereof, and judgment was rendered for the defendant; that thereafter and within the time prescribed by law, plaintiff perfected an appeal to the above-entitled court, and that the time within which plaintiff shall, under the rules, docket said cause and file his record on appeal expires February 1, 1917.

That the preparation and settlement of bill of exceptions in this matter consumed considerable time, and said bill of exceptions has finally been settled and the engrossed bill was certified by the Court and filed on January 19, 1917; that the record in this case will be of considerable length and will require some considerable time for preparation; and affiant believes and avers that the Clerk of the District Court should have until March 1st, 1917, within which to prepare said record and transmit same to the clerk of the above-entitled court.

Affiant is informed and believes that the calendar for the February term of this court has been prepared and that the above-entitled matter cannot now be placed on the calendar until the May term of this court, and that the hearing and final determination of this case will not in any way be postponed by the extension of time here requested.

CHARLES S. WHEELER,

Subscribed and sworn to before me this 23d day of January, 1917.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended to and including March 1st, 1917.

Dated January 24, 1917.

WM. W. MORROW,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Affidavit for Extension of Time to Docket Cause and File Record. Filed Jan. 24, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

POWER & IRRIGATION COMPANY OF CLEAR LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Affidavit of Charles S. Wheeler, and Order Extending Time to and Including March 1, 1917, to File Record, etc.

State of California,
City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above-entitled action.

That said action was heretofore tried in the District Court of the United States for the Northern District of California, Second Division thereof, and judgment was rendered for the defendant; that thereafter and within the time prescribed by law, plaintiff perfected an appeal to the above-entitled court, and that the time within which plaintiff shall, under the rules, docket said cause and file his record on appeal expires to-day, March 1, 1917.

That a bill of exceptions has been settled and filed, and a praecipe for the preparation of said record by the clerk of the District Court has been filed, but affiant has been informed and believes that additional time will be required for the clerk to prepare said record.

Affiant is further informed and believes that the above appeal cannot be placed on the calendar for argument in the above-entitled court until the May term thereof, and that the hearing and final determination of said appeal will in no way be postponed by an extension of time to and including March 20, 1917, within which to allow the clerk of the lower

court to prepare said record, and to file same and docket said cause in this court.

CHARLES S. WHEELER.

Subscribed and sworn to before me this 1st day of March, 1917.

[Seal] ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended to and including March 20, 1917.

Dated March 1st, 1917.

WM. W. MORROW,

Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Affidavit for Extension of Time to File Record. Order Extending Time. Filed Mar. 1, 1917. F. D. Monckton, Clerk.

No. 2956. United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake vs. Springe. Seven Orders Under Rule 16 Enlarging Time to Mch. 20, 1917, to File Record Thereof and to Docket Case. Refiled Mar. 20, 1917. F. D. Monckton, Clerk.